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## Notice

Effective October 1, 1987, a revised vocabulary has been used to index Comptroller General decisions and other legal documents. The new vocabulary uses three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, N.W. 20548, or by calling (202) 275-6241.

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# Preface

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This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States*. The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards, pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector, whether the decision modifies, clarifies, or overrules the findings of prior published decisions, and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

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Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974 and Civilian Personnel Law decisions, whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

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**B-231453.2, March 2, 1989**

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## **Procurement**

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### **Competitive Negotiation**

- **Unbalanced offers**
- ■ **Rejection**
- ■ ■ **Propriety**

The apparent low offer under a request for proposals for washer and dryer rental for a 1-year base period and two 1-year options is mathematically unbalanced where there is a price differential of 685 percent between the base year and the second option year and the requirement is essentially the same for all 3 years. Such an offer is properly rejected as materially unbalanced where the agency has a reasonable doubt that acceptance of the offer, which would not become low until the final option year, would ultimately result in the lowest overall cost to the government.

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## **Procurement**

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### **Socio-Economic Policies**

- **Small businesses**
- ■ **Competency certification**
- ■ ■ **Applicability**

The Small Business Administration's Certificate of Competency program addresses a small business concern's responsibility for purposes of receiving a government contract and does not apply where the firm is not otherwise qualified to receive award.

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## **Matter of: D&G Contract Services**

D&G Contract Services protests the award of a contract to Four Seasons Support Services under request for proposals (RFP) No. DAKF40-88-R-0403, issued by the Army for the rental and maintenance of washers and dryers for troop housing at Fort Bragg and Camp McKall, North Carolina. D&G challenges the Army's determination that its proposal was materially unbalanced. We deny the protest in part and dismiss it in part.

The RFP provided for award of a 1-year base period with two 1-year options. The RFP incorporated by reference the clause at Federal Acquisition Regulation (FAR) § 52.217-5, entitled Evaluation of Options, which advised offerors that proposals would be evaluated based on the total price for the base period and all options, and further cautioned that the government could reject an offer materially unbalanced as to prices for the basic requirement and the option quantities. The clause defined an unbalanced offer as one offering prices that are significantly less than cost for some work and significantly overstated for other work. Award was to be made to the lowest priced technically acceptable offer.

On the August 26, 1988 closing date, the Army received 10 offers. According to the Army, D&G proposed \$801,240, the lowest total price for all 3 years. That firm proposed \$410,860 for the base year, \$339,220 for the first option year and \$51,160 for the second option year. Four Seasons proposed a price of \$381,867 for the base year, and \$310,035 and \$147,135 for the options for a total price of \$839,037. The contracting officer rejected D&G's offer as unbalanced. Six other offerors were eliminated from the competitive range. Best and final offers were requested from the remaining three offerors and award was made on November 9 to Four Seasons.

D&G argues that its offer is not unbalanced because it is based on recovering the cost of equipment in the first year. The firm also asserts that if its offer is unbalanced then the awardee's offer is also unbalanced.

Although the concept of unbalancing generally applies to a sealed bidding situation, it also may apply to negotiated procurements where, as here, cost or price constitutes a primary basis for source selection. *tg Bauer Associates, Inc.*, B-228485, Dec. 22, 1987, 87-2 CPD ¶ 618. An offer is materially unbalanced where: (1) it is mathematically unbalanced in that each item does not carry its share of the cost of work, or is based on nominal prices for some of the work, and enhanced prices for other work; and (2) award based on the mathematically unbalanced offer will not result in the lowest overall cost to the government. *Semcor, Inc.*, B-227050, Aug. 20, 1987, 87-2 CPD ¶ 185. Although there may be certain pricing variables depending on the nature of the procurement, an offer will be questioned if, in terms of the pricing structure evident among the base and optional periods, it is neither internally consistent nor comparable to other offers received. Thus, a large pricing differential existing between the base and option periods, or between one option period and the other, is itself *prima facie* evidence that the offer is mathematically unbalanced. *Howell Construction, Inc.*, 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455.

The record shows that D&G's base year price is 685 percent higher than its price for the second option year and its first option year is 563 percent higher than its second option year. We have held much smaller differentials to indicate by their very magnitude that the offer is mathematically unbalanced. *See Professional Waste Systems, Inc. et al.*, 67 Comp. Gen. 68 (1987), 87-2 CPD ¶ 477.

The record shows that D&G's offer may not result in the lowest cost to the government as its total price does not become low when compared to the awardee's price until the eighth month of the final option year. The determination of whether there is a reasonable doubt that award to the offeror submitting a mathematically unbalanced offer will result in the lowest ultimate cost to the government is a factual one which varies depending upon the particular circumstances of each procurement. *Aquasis Services, Inc.*, B-228044, Nov. 2, 1987, 87-2 CPD ¶ 426. In cases involving extreme front-loading and where the mathematically unbalanced offer does not become low until the end of the final option year, despite the initial intent to exercise the options, intervening events could cause the contract not to run its full term, resulting, therefore, in inordinately high cost to the government and a windfall to the offeror. Under this type of

factual situation, we have held that there was a reasonable doubt whether the mathematically unbalanced offer would ultimately provide the lowest cost to the government. *D&G Contract Services*, B-232879, Dec. 12, 1988, 88-2 CPD ¶ 584. Since D&G's offer does not become low until near the end of the last option year, we find that it was reasonable for the Army to doubt that acceptance of D&G's offer would actually provide the lowest cost to the government and to reject the offer as materially unbalanced. *Id.*

D&G also complains in its comments on the agency report that if its offer is unbalanced, then so is Four Season's offer. It is true that Four Seasons did propose significantly less for the third option year than for the base or first option year; however, the difference was not nearly as great as that proposed by D&G. Moreover, as indicated above, Four Season's offer is low until well into the last option year. Consequently, we have no reason to question the agency's obvious position that Four Season's offer reasonably represents the lowest cost to the government and therefore could be accepted.

Finally, D&G argues that the agency improperly determined that it was nonresponsible without referring the matter to the Small Business Administration (SBA) under that agency's Certificate of Competency (COC) procedures. The Army responds that D&G's responsibility was initially a matter of concern to the contracting officer based on a recent preaward survey conducted in connection with another procurement. According to the Army, it was prepared to refer the matter to the SBA; however, prior to the referral the contracting officer found D&G's offer materially unbalanced and rejected it on that basis.

There is nothing in the record which indicates that D&G was rejected on the basis of nonresponsibility. As indicated above, its offer was rejected because it was unbalanced. A COC warrants that a small business is capable and otherwise responsible for the purpose of receiving and performing a government contract. The COC procedures do not apply where as here the firm is not otherwise qualified to receive award. *See Jarke Corp.*, B-231858, July 25, 1988, 88-2 CPD ¶ 82.

The protest is denied.

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**B-233439, March 2, 1989**

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**Procurement**

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**Competitive Negotiation**

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Descriptive literature**

Even though a request for proposals (RFP) did not specifically require the submission of descriptive literature with proposals, where protester submitted with its technical proposal its product brochure which indicated the item it offered did not comply with the RFP specifications without modifications, it was not improper for the contracting agency to reject the proposal as technically unacceptable based on that descriptive literature.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Contract awards**

#### **■ ■ Initial-offer awards**

#### **■ ■ ■ Propriety**

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Technical acceptability**

#### **■ ■ ■ Deficiency**

#### **■ ■ ■ ■ Blanket offers of compliance**

Where initial technical proposal makes a blanket offer to provide products that conform to the requirements of the request for proposals, but also takes specific exceptions to the solicitation specifications, the contracting agency's rejection of such proposal without discussions and award of the contract based on the lowest-priced, technically acceptable offer is not unreasonable or in violation of federal procurement principles if the solicitation explicitly provided that award might be made on the basis of initial proposals.

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## **Matter of: Sabre Communications Corporation**

Sabre Communications Corporation protests the award of a contract under request for proposals (RFP) No. N60530-88-R-0254, issued by the Department of the Navy for seven self-supporting antenna towers. Sabre contends that the Navy improperly rejected its lower-priced proposal as technically unacceptable. We deny the protest.

The RFP, issued on March 28, 1988, contemplated the award of a fixed-price contract for the acquisition and erection of one 80-foot tower, one 60-foot tower and five 40-foot towers to support antennae which were to be mounted in the center of the top of each tower. The RFP stated that award was to be made to the responsible offeror whose proposal met the requirements of the solicitation at the lowest price. The RFP further stated that the contract might be awarded on the basis of initial offers received without discussions and, "[t]herefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

The Navy states that it solicited 48 potential offerors, 13 of which responded to the solicitation. Following the evaluation of technical and price proposals (which were required to be submitted separately), award was made to the Tri-Ex Tower Corporation because its proposal offered the lowest evaluated price (\$134,768) of the three proposals determined to be technically acceptable.

Sabre's lower-priced proposal (\$102,497) was rejected as technically unacceptable on the basis that it did not comply with the RFP requirements. Specifically, Sabre submitted along with its proposal an advertising brochure containing an illustration and description of the tower model it proposed with antennae and accompanying hardware mounted on the sides of the tower, not at the top of the tower as required by the RFP. The only indication in Sabre's "technical propos-

al”<sup>1</sup> that could be construed as referring to where Sabre proposed to mount the antennae was found in three phrases on the first page of its proposal, stated as follows:

(1. 80 Ft. S.S.

1 ant. (1000 lbs.) 100 sq. ft. at top

(2. 60 Ft. S.S.

1 ant. (1000 lbs.) 64 sq. ft. at top

(3. 40 Ft. S.S.

1 ant. (1000 lbs.) 64 sq. ft. at top.

Sabre maintains that the agency’s rejection of its proposal based on information depicted in its brochure was improper because its proposal stated that an antenna was to be located at the “top” of each tower, and because the solicitation did not require descriptive literature. The protester further expresses the view that the Navy could have resolved, through an informal inquiry, any questions concerning where it proposed to mount the antennae on the towers.

Clause L-15 of the RFP required that the technical proposal constitute a comprehensive statement of the offeror’s method of approach, developed in sufficient detail for the technical evaluators to evaluate it thoroughly and determine whether the proposal would satisfy the solicitation requirements. Clause L-15 further stated that technical proposals should be specific, detailed and sufficiently complete to demonstrate how the offeror would accomplish the contract objectives.

In the administrative report filed in response to the protest, the Navy states that because Sabre’s proposal failed to demonstrate or provide details concerning how it would accomplish the technical requirements of the solicitation, the evaluators referred to the brochure—the only other data Sabre submitted with its proposal—which showed that the proposed antenna mount location, as well as the mounting hardware, was inconsistent with the RFP specifications and, thus, unacceptable for the government’s purpose.

The Navy further states that, although not mentioned in the letter informing the protester of the reasons for its rejection, Sabre’s proposal also failed to meet the tower dimensions and load capacity requirements of the RFP, as amended.<sup>2</sup> By solicitation amendment 003 (which the protester states it received on June 10), the RFP required a 2,000-pound load capacity for the 80-foot tower and a minimum top width (spread) of 6 feet, 8-3/4 inches for each side of the towers. Although Sabre acknowledged receipt of all amendments, its proposal specifical-

<sup>1</sup> Aside from the brochure, Sabre’s proposal consisted of five pages, which included a one-page limited warranty statement and a two-page listing of 14 customer references.

<sup>2</sup> The agency issued three amendments to the solicitation. Amendment 001 was issued on April 22 to extend the closing date from May 2 to May 21, and to provide responses to technical questions raised by potential offerors. Amendment 002, issued on May 20, extended the closing date from May 21 to June 6, to allow for further modifications and clarifications of the solicitation statement of work (which the amendment stated would be issued at a later date). Amendment 003, which was issued on June 2, further extended the closing date to June 21 and made changes in the windloading, tower platform, tower dimensions, and antenna mount requirements as provided in the statement of work.

ly provided for a 1,000-pound load capacity for the 80-foot tower as initially specified in the RFP statement of work, and tower top widths of 6 feet, 6-3/4 inches. Thus, the Navy maintains that Sabre's proposal was technically unacceptable in that it failed to meet the solicitation requirements based on descriptive literature submitted with its proposal and because its technical proposal did not comply with the RFP specifications.

The evaluation of proposals is primarily the responsibility of the contracting agency; thus, we generally will not disturb an agency's technical evaluation absent a clear showing that the determination was unreasonable or violated procurement statutes or regulations. *Idaho Norland Corp.*, B-230598, June 6, 1988, 88-1 CPD ¶ 529.

The issue here is whether the agency properly made award on the basis of initial proposals without discussions. Although the RFP did not specifically call for the submission of descriptive literature, the statement of work required offerors to provide tower and footing drawings and calculations for each of the tower designs. However, as indicated above, apart from its brochure Sabre's "technical proposal" consisted of two pages, which essentially included a blanket offer of compliance with the initial RFP specifications, the firm's proposed installation time, payment terms, warranty statement and list of references. Any and all footing drawings or diagrams and calculations were provided only in the brochure Sabre submitted with its proposal. Thus, even though the RFP did not specifically require descriptive literature, it would appear that the protester, in fact, submitted the brochure as a part of its proposal with the expectation that the agency would refer to it in assessing the acceptability of its proposal.

On the first page of its proposal Sabre stated that it was offering its Model SS3T tower. Further, in a cover letter to its proposal, Sabre stated:

We . . . emphasize that we are proposing to provide our Model SS3T tower, this design is the most widely used design in the tower industry.

Although tower model SS3T was shown in the brochure with side-mounted antennae, Sabre's proposal did not explain any difference between the model as shown in the brochure and what it proposed to provide in response to the RFP, or how it proposed to modify its product to meet the specification requirements. Thus, the information Sabre submitted to illustrate what it proposed to provide was clearly inconsistent with the solicitation's requirement that the antenna be mounted in the center of the top of each tower, as well as with Sabre's sole reference in the three phrases on the first page of its technical proposal to "1 ant. (1000 lbs.) . . . at top."

Concerning the Navy's position that Sabre's proposal was also unacceptable because it did not comply with the amended load capacity requirement for the 80-foot tower, the protester states that in response to the increased load requirement, "we . . . revised our designs to reflect the revised loadings . . . but overlook[ed] changing the load on our proposal" that had already been prepared to meet previously established closing dates. The protester expresses the view that even though it did not change the load requirement or the tower dimen-

sions in its proposal, its offer complied with the amended specifications by virtue of its acknowledgment of receipt of the amendments.

When an RFP requires the submission of information bearing on the technical adequacy of an offeror's proposal, the offeror must demonstrate the technical sufficiency of its proposal; a blanket offer of compliance with the specifications is not sufficient to comply with an RFP requirement for detailed technical information necessary for evaluation purposes. *AEG Aktiengesellschaft*, 65 Comp. Gen. 419 (1986), 86-1 CPD ¶ 267 at 4; see *Consolidated Bell, Inc.*, B-228511, Feb. 22, 1988, 88-1 CPD ¶ 179. This is true whether such blanket offer of compliance is stated as a part of the proposal or implied by the acknowledgment of receipt of any or all solicitation amendments—particularly where the proposal takes specific exceptions to the RFP's requirements.

We have recognized that award may properly be made based on initial proposals provided that, as here, notice of that possibility is stated in the RFP, and there is no other lower-priced technically acceptable proposal. See *AEG Aktiengesellschaft*, 65 Comp. Gen. 419, *supra*.

In *AEG Aktiengesellschaft*, 65 Comp. Gen. 419, *supra*, the RFP required that offerors submit with their proposals "detailed descriptions and/or illustrations for [the] item offered to [facilitate the] technical evaluation . . . ." The protester's technical proposal was found unacceptable, in spite of its blanket offer of compliance with the solicitation specifications because the information (descriptive literature showing the protester's standard products) submitted to demonstrate the technical sufficiency of the proposed product showed that it did not comply with the specifications without modifications. As in the instant case, award was made based on initial offers without discussions, in accordance with the RFP provisions, even though the protester's price proposal was lower than that of the awardee.<sup>3</sup> Similarly, in *Consolidated Bell, Inc.*, B-228511, *supra*, we upheld the agency's rejection of the protester's proposal as technically unacceptable on the basis of descriptive literature submitted with the technical proposal (though not specifically required by the RFP) which demonstrated that the offered product was inconsistent with the specification requirements.

Accordingly, in view of the inconsistencies between Sabre's proposal (including the descriptive literature it submitted) and the RFP specifications, we find that the Navy's rejection of Sabre's proposal as technically unacceptable and award of the contract based on the lowest-priced technically acceptable initial offer has not been shown to have been unreasonable. Furthermore, we note that contrary to Sabre's contention that the agency could have easily resolved the questions concerning its proposal by an informal inquiry, in light of the scope of the deficiencies in the proposal, it would have been inconsistent with the terms of the

<sup>3</sup> We recognize that in the instant case, the RFP did not specifically require the submission of descriptive literature, *per se*, as did the solicitation in *AEG Aktiengesellschaft*, 65 Comp. Gen. 419, *supra*. Nevertheless, in this instance the referenced case is not distinguished by the descriptive literature requirement since the technical information requirement in the subject solicitation may properly be considered to encompass descriptive literature, and in any event, that is what Sabre chose to provide in response to the requirement.

RFP for the agency to request the information required to ascertain its technical acceptability under the circumstances of this procurement.<sup>4</sup>

Sabre also suggests the agency may have conferred with the awardee in view of the changes made to the specifications by amendment 003. However, since Sabre presents no clear evidence in support of that allegation, and there is otherwise no substantiation of it in the record, we find no basis to conclude that discussions were held with the awardee.

Finally, we do note that the agency failed to promptly notify unsuccessful offerors of the award of the contract. We conclude that the protester was not prejudiced by this procedural deficiency since award was made in accordance with the provisions of the RFP on the basis of the lowestpriced technically acceptable initial proposal. See *American Mutual Protective Bureau, Inc.*, B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65.

The protest is denied.

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## **B-233183, March 3, 1989**

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### **Civilian Personnel**

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#### **Compensation**

##### **■ Personnel death**

##### **■ ■ Balances**

##### **■ ■ ■ Payees**

The claims by his mother and alleged son for unpaid compensation due a deceased civilian employee are too doubtful to be allowed without resolution by a court of competent jurisdiction. The alleged son's claim is higher on the statutory list of distribution; however, his status as son is based on a document executed by the deceased in El Salvador recognizing him as the deceased's son, and other information of record makes his status as biological son questionable.

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## **Matter of: Estate of John A. Thomas—Unpaid Compensation**

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### **Issue**

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This is in response to a request for reconsideration of our Claims Group's determination Z-2865725, July 13, 1988, concerning the claims for the unpaid compensation in the amount of \$4,447.81 due Mr. John A. Thomas, a deceased civilian employee. That determination considered the competing claims of Mrs. June P. Thomas, as mother, and that of Mr. Manuel de Jesus Thomas Rivas, as son based on a notarized recognition document stating that it was filed by Mr. Thomas with the civil court of El Salvador. The Claims Group concluded that there was too much doubt to warrant payment to either claimant. Mrs. Thomas

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<sup>4</sup> We note from our review of the record that five offerors who had failed to submit any technical proposals were requested to do so by the agency. The awardee was not among these offerors; its proposal, like the protester's, was evaluated for award based on the initial and only offer which it made.

takes exception to that finding and has requested reconsideration of her claim based on her contention that the recognition document is fraudulent and should be considered void. For the reasons stated below we conclude that, in the absence of a determination by a court of competent jurisdiction as to whether the document filed by Mr. Thomas recognizing Mr. Rivas as his son is valid, the status of Mr. Rivas as his son is too uncertain to authorize payment to either of the claimants.

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## Background

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Mr. John A. Thomas, an employee of the Department of Agriculture stationed in San Sebastian, Puerto Rico, died in Aguadilla, Puerto Rico, on October 21, 1987. Mr. Thomas had not filed a designation of beneficiary with his agency for any unpaid compensation due him. Mr. Thomas did file a holographic will dated April 5, 1982, with his agency. This will indicates the individuals to whom he wished to leave designated portions of the proceeds from his Federal Employees Group Life Insurance, other life insurance policies, and personal effects. It does not, however, indicate to whom unpaid compensation should be paid, nor does it include a catch-all phrase indicating to whom any other monies due him should be paid.

Mr. Thomas, who was never married, is survived by his mother, Mrs. June P. Thomas, who has filed a claim for the unpaid compensation. A claim has also been filed by Mr. Manuel de Jesus Thomas Rivas, a resident of El Salvador, who claims that he is the recognized natural son of the deceased. Mr. Rivas's claim is based upon several documents, including copies of (1) a notarized "Title Deed of Recognition" dated May 10, 1980, in which Mr. Thomas recognizes Mr. Rivas as his own son with all accompanying rights and privileges; (2) the certification issued by the Civil Registry of El Salvador of the birth of Mr. Rivas; and (3) the subsequent marginal notation on the official certification indicating the paternal recognition by Mr. Thomas.

Mr. Rivas contends that under the laws of El Salvador these documents prove he is the natural child of Mr. Thomas since he has been recognized by Mr. Thomas voluntarily with the intent of conferring upon him all the rights of a natural child. He further contends that, inasmuch as these documents were properly executed and recorded, they have the value of full proof of his claim as a surviving child of Mr. Thomas.

Mrs. Thomas, in support of her claim, questions the validity of the documents submitted by Mr. Rivas. Her contention is that the documents are fraudulent since Mr. Thomas could not have been the natural father of Mr. Rivas. The record shows that Mr. Rivas was born February 10, 1955, in El Salvador. In 1954, Mr. Thomas was a student at the Virginia Polytechnic Institute in Blacksburg, Virginia. Also, it is stated that a passport issued to Mr. Thomas on May 26, 1954, shows no entrance to or exit from El Salvador. The first registered entrance of Mr. Thomas into El Salvador is September 6, 1972. Further, there is

nothing in the record which would indicate that Mr. Rivas's mother, Ms. Nieve Rivas, visited the United States in 1954.

In its determination, the Claims Group found that there is too much doubt to warrant payment to either claimant since the evidence necessary to establish the liability of the United States in this case is not clear.

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## Opinion

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The disposition of unpaid compensation due an employee of the federal government is controlled by the provisions of 5 U.S.C. § 5582(b) (1982), which state in pertinent part that the money due shall be paid in the following order of precedence:

First, to the beneficiary or beneficiaries designated by the employee in a writing received by the employing agency before his death.

Second, if there is no designated beneficiary, to the widow or widower of the employee.

Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.

Fourth, if none of the above, to the parents of the employee or the survivor of them. . . .

Since the first and second provisions do not apply in this case, Mr. Rivas contends that he is next in line and should be paid the amount in question as the recognized child of Mr. Thomas.

Inasmuch as Mr. Rivas's alleged status as son is based upon the documents executed in El Salvador, we requested a review of the documents and an opinion as to their validity by the Hispanic Law Division (Division) of the Library of Congress. In its report to us dated December 16, 1988, the Division found that the recognition documents, in which the parties have been clearly identified, meets the requirements of articles 279 and 280 of the Civil Code of El Salvador concerning the acknowledgement by the father of a natural child, since it is a notarized statement of recognition duly recorded in the Civil Registry.<sup>1</sup> The Division noted that certifications issued by the Civil Registry are public documents, and as such are presumed to constitute full proof of civil status under the rules of article 260 of the Code of Civil Procedure.

However, the Division points out that this legal presumption may be attacked under article 234 of the Civil Code by showing that the information contained in the records is false. This may be done by filing a petition to declare the certification null and void before the corresponding competent civil court in El Salvador, and by presenting evidence to substantiate the claim of nullity. The Division advises that a declaration of nullity may be requested by any interested party under the rules of nullity in articles 1551 to 1568 of the Civil Code. If the

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<sup>1</sup> We note that none of the copies we received of the recognition document contained the actual signatures of Mr. Thomas or Mr. Rivas. However, we were advised by the Division that the actual signatures of the parties were not necessary since the notary public verified the appearance and identity of the parties. The notary public's signature is sufficient to provide the formality necessary to validate the document as a duly registered public instrument.

petition is successful, the court will order the rectification of the challenged record by the Civil Registry.

The conclusion, then, is that the documents submitted by Mr. Rivas constitute proof of civil status under the laws of El Salvador unless successfully challenged before a competent civil court in El Salvador.<sup>2</sup> However, in view of other information in the record Mr. Rivas's status as the son of Mr. Thomas is not sufficiently clear for us to authorize payment to him. It is questionable that Mr. Thomas was actually the biological father of Mr. Rivas since Mr. Thomas apparently did not enter El Salvador or appear to have been able to have contact with Ms. Nieves Rivas until 1972, and Mr. Rivas was conceived in 1954. We further note that, while Mr. Thomas does leave some money to Mr. Rivas in his will, which was written after the recognition document, he does not refer to Mr. Rivas as his son but rather as someone, along with others mentioned in the will, who "meant a lot" to him.

Accordingly, the facts in this case are too uncertain for us to authorize payment to either claimant. In such doubtful cases we leave the claimants to pursue their remedy in a court of competent jurisdiction.

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**B-233312, B-233312.2, March 3, 1989**

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**Procurement**

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**Competitive Negotiation**

■ **Unbalanced offers**

■ ■ **Materiality**

■ ■ ■ **Determination**

■ ■ ■ ■ **Criteria**

Awardee's offer for base and option quantities is not materially unbalanced where the protester fails to show that the option quantities evaluated were not reasonably expected to be exercised and that award to the firm will not result in the lowest ultimate cost to the government.

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**Matter of: Surface Technologies Corporation**

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Surface Technologies Corporation (STC) protests the award of a contract to Alfab, Inc. under request for proposals (RFP) No. F09603-88-R-74799, issued by the Department of the Air Force for the refurbishment of runway matting. STC alleges that Alfab's proposal was unbalanced and should have been rejected.

We deny the protest.

The solicitation required the contractor to refurbish 12-foot sheets of runway matting, and then to assemble the sheets into packages or bundles of 16 sheets, plus four 6-foot sheets to be furnished by the contractor. The solicitation requested price proposals for both a base quantity of 538 bundles, and a 1-year

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<sup>2</sup> The record contains a letter from an attorney in El Salvador retained by Mrs. Thomas which indicates that he is prepared to go forward with a petition to challenge the recognition document in the proper court.

option for a maximum additional quantity of 1,345 bundles. The option quantity prices were for bundles in 7 stepladder quantities in increments of 200 (from 1-200 to 1,201-1,345). The options were noncumulative, so that the price to the government for each option quantity exercised would be the price offered for that quantity, irrespective of any prior option quantities ordered.

The RFP incorporated by reference the Federal Acquisition Regulation (FAR) clause entitled Evaluation of Options, FAR § 52.217-5, which advised offerors that the government would evaluate offers by adding the total price for all options to the total price of the basic requirement, and that the government could reject an offer if it were materially unbalanced as to prices for the basic requirement and the option quantities. The clause defined an unbalanced offer as one offering prices that were significantly less than cost for some work and prices which were significantly overstated for other work. Apparently recognizing that this option provision did not set forth a clear means of evaluating the stepladder quantities here, the Air Force amended the solicitation to provide that, for purposes of award, the option would be evaluated by multiplying the maximum quantity of 1,345 bundles by the unit price for the first increment of 1-200 units; in other words, only the base and 1-200 option quantity prices were to be evaluated.

The Air Force received four proposals in response to the solicitation, and requested all offerors to submit best and final offers (BAFOs). Alfab and STC were found to have submitted the respective low and second low BAFOs. STC proposed a lower base quantity price (\$1,997 per unit, for a total of \$1,075,182) than Alfab's (\$2,054 per unit, for a total of \$1,106,179), and a lower unit price (\$1,997) for the unevaluated 1201-1345 unit option increment than Alfab's (\$2,054). However, Alfab's total evaluated price for the base and 1-200 option quantity (\$2,489,671.50) was lower than STC's (\$3,964,007).

Alfab's evaluated price was low despite the firm's higher base quantity price because it priced the 1-200 option quantity, the only option quantity evaluated, at only \$1,026.50 per unit, and all the other increments at \$2,054. STC, on the other hand, offered prices that decreased as the quantity increased (from \$2,145 for the 1-200 quantity to \$1,997 for the 1,201-1,345 quantity). The Air Force made award to Alfab on the basis that it had submitted the low-priced proposal when evaluated pursuant to the solicitation.

In its protest, STC contends that Alfab's offer is mathematically unbalanced because the price for the 1-200 option quantity is only half as high as the prices for the other, larger option quantities. STC contends that Alfab's offer also is materially unbalanced because under several scenarios it will not result in the lowest cost to the government; for example, if the Air Force exercised the option once for a quantity of 1,345 units, STC's price for the base and option quantities (\$3,761,147) would be lower than Alfab's (\$3,868,809).

We have recognized that the concept of material unbalancing may apply in negotiated procurements where, as here, cost or price constitutes a primary basis for source selection. An offer is materially unbalanced where: (1) it is mathe-

matically unbalanced, that is, each item does not carry its share of the cost of the work, in that nominal prices are offered for some of the work and enhanced prices for other work; and (2) there exists a reasonable doubt as to whether award based on a mathematically unbalanced offer will result in the lowest overall cost to the government. See *IMPESA International, Inc.*, B-221903, June 2, 1986, 86-1 CPD ¶ 506.

While, as STC points out, Alfab's price for the 1-200 option quantity is 50 percent lower than the base and remaining option quantity prices, and thus is arguably nominal under the above standard, there is no indication, and STC does not allege, that Alfab's offer contains enhanced prices for any quantities. As explained, Alfab's price for the base quantity and all but the 1-200 option quantity was \$2,054 per unit, which price clearly was in the same range as STC's own prices (\$2,145 to \$1,997 per unit), and thus was not enhanced. (As a further indication that Alfab did not overload certain prices to offset its low 1-200 option quantity price, Alfab initially priced its offer at \$2,054 per unit for all quantities, and reduced the 1-200 quantity price only after the RFP was amended to provide that only this option quantity would be evaluated for award.) We have specifically held that an offer is not mathematically unbalanced absent evidence that certain prices are overstated. See *IMPESA Int'l., Inc.*, B-221903, *supra*.

In any case, we find that STC has not shown that there is a reasonable doubt that the award to Alfab will result in the lowest cost to the government. In this regard, the agency now reports that it fully intends to exercise the 1-200 quantity option to take advantage of Alfab's low price; as noted previously, upon the first exercise of the 1-200 option quantity, Alfab's contract would result in the lowest price under any combination of increments totalling 1,345.

We have no basis to question the Air Force's intentions. The Air Force reports it has always had a firm requirement for the 1,345 additional optional units, having solicited the option quantity on a stepladder basis only because of uncertainty as to funding; as reflected in the amendment providing for evaluation of the base and 1-200 option quantities, however, the agency has anticipated funding for at least those quantities. STC challenges neither the agency's intent nor the likelihood of sufficient funding. Further, we note that the scenario posited by STC (exercise of the 1,201-1,345 quantity option), under which its price would be low, seems most unlikely given that the RFP appears to allow the Air Force to exercise Alfab's low-priced 1-200 quantity option the several times necessary to satisfy the entire 1,345 unit option requirement; the Air Force specifically brought this fact to Alfab's attention prior to award.

STC also argues that the RFP is ambiguous because it allegedly included two methods for the evaluation of options: it incorporated the FAR clause providing for evaluation of the total price for all options, while also including solicitation clause M505, which provides for the option to be evaluated by multiplying the maximum quantity of 1,345 units by the price for the 1-200 units increment.

Under our Bid Protest Regulations, alleged deficiencies on the face of a solicitation must be protested prior to the closing date for receipt of initial proposals. 4

C.F.R. § 21.2(a)(1) (1988). Here, although STC maintains that this basis of protest was not apparent until it received the Air Force's report, we see no reason why any inconsistency between the clauses should not have been apparent from reading the two clauses upon receipt. We conclude that, to be timely, this allegation had to be raised prior to the closing date for receipt of proposals. In any event, we view clause M-505 as merely setting forth a more specific method of evaluating the total option quantity (1,345 units), as the FAR clause provided.

We deny the protest.

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**B-233574, March 3, 1989**

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**Procurement**

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**Sealed Bidding**

■ **Bids**

■ ■ **Responsiveness**

■ ■ ■ **Small business set-asides**

■ ■ ■ ■ **Compliance**

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of the bid where such small business certification is not required for the type of contract to be awarded.

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**Matter of: Century Marine Corp.**

Century Marine Corp. protests the rejection of its bid as nonresponsive and the award of a contract to Houston Ship Repair under invitation for bids (IFB) No. DTMA-93-88-B-80705, a total small business set-aside, issued by the Maritime Administration for the towing and repair of the vessel, "Pioneer Crusader." The agency rejected Century's bid because the firm failed to certify in its bid that all end items to be furnished under the contract would be manufactured or produced by small business concerns.

We sustain the protest.

The agency received three bids on August 29, 1988, the bid opening date. The contracting officer determined that Century's low bid was nonresponsive because Century had not entered into a Master Agreement with the Maritime Administration before bid opening, and it did not otherwise provide representations and certifications in its bid, including a certification that all end items would be manufactured by small business concerns.

The Master Agreement is used by the agency to standardize vessel repair contracts and contains generally applicable standard form clauses and contractor representations and certifications, including small business certifications. The Master Agreement is entered into by a potential bidder and the agency independent of any procurement and is incorporated by reference into solicitations as issued by the agency. While Century submitted a Master Agreement for the agency's approval on July 15, 1988, it was found to be incomplete, and Century

apparently did not submit a properly completed Master Agreement until October 1988, approximately 6 weeks after bid opening. Upon submission of the completed Master Agreement, Century represented that it was a small business concern but that not all end items would be manufactured by small business concerns.<sup>1</sup> Award was made to Houston Ship Repair, the second low bidder, at a price of \$1,335,493, which was approximately \$96,000 more than Century's low bid. This protest followed.

In a recent decision, *Century Marine Corp.*, B-232630, Dec. 16, 1988, 88-2 CPD ¶ 598, involving this same protester and agency, and the same solicitation terms, we stated that a bidder's failure to sign the Master Agreement before bid opening does not require rejection of the bid. Specifically, we stated that by signing its bid, the protester agreed to be bound by all the terms of the Master Agreement except the representations and certifications. We noted that Section J of that IFB, as here, stated that "[a]ll terms, conditions, articles, and referenced documents and clauses of the Maritime Administration Master Lump Sum Repair Agreement . . . shall be considered as part of this contract." Further, we also noted that Section H, as here, provided that non-holders of a Master Agreement may bid if they agree "in writing" that "all terms and conditions of the Agreement apply to its bid." We therefore found that Century's signature on the bid constituted its written agreement to abide by the terms and conditions of the solicitation which specifically included all of the terms and conditions of the Master Agreement. We find that Century is equally bound here.

However, Century, both here and in the prior case, did not submit representations and certifications required of non-holders. They generally consist of standard certifications which commonly appear in solicitations, such as those relating to previous contracts and compliance reports, independent price determination, contingent fees, affirmative action and type of business organization. Concerning these matters, we stated in our prior decision that such certifications and representations that have no bearing on whether the bid constitutes an unequivocal offer to provide the product or service does not affect the bid's responsiveness. See *R&R Roofing and Sheet Metal, Inc.*, B-220424, Nov. 21, 1985, 85-2 CPD ¶ 587. We also noted in our prior decision, as relevant here, that the only material certification, whether the bidder will supply end items manufactured or produced by small business concerns, was immaterial since that procurement was not a small business set-aside. Accordingly, we concluded in our prior decision that Century's bid was improperly rejected.

Here, the agency argues that this solicitation was a small business set-aside and that Century's failure to certify that it will furnish end items from small business concerns renders the bid nonresponsive. We disagree.

The Master Agreement, referenced in the IFB, incorporates Federal Acquisition Regulation (FAR) clause 52.219-1 (FAC 84-28), the small business concern repre-

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<sup>1</sup> Century states that it honestly could not certify that all "end items" would be manufactured by small business concerns because ship repair involves "thousands of parts and pieces of equipment," such as steel, that are manufactured by large business.

sensation. The clause in part requires that the contractor provide only end items that are manufactured or produced by small business concerns inside the United States, its territories and possessions. However, the Master Agreement also incorporates another applicable small business clause (Notice to Total Small Business Set-Aside—FAR clause 52.219-6), which specifically states that the end item requirement does not apply in connection with construction or service contracts. Here, our review of the solicitation clearly shows that the procurement is for towing and ship repair services and does not contemplate a supply contract. Accordingly, since the certification is not required for service contracts, Century's failure to certify does not affect the responsiveness of the firm's bid. See *BCI Contractors, Inc.*, B-232453, Nov. 7, 1988, 88-2 CPD ¶ 451. We therefore sustain the protest.

Since significant performance under the awarded contract has again occurred, as in the prior case, we do not recommend that the award be disturbed. However, in view of our conclusion that Century's bid was responsive and improperly rejected, we think that Century is entitled to bid preparation costs and to the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988). Century should submit its claim for such costs directly to the agency.

The protest is sustained.

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**B-231407, March 6, 1989**

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**Civilian Personnel**

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**Compensation**

■ **Additional compensation**

■ ■ **Medical officers**

■ ■ ■ **Physicians**

A medical officer of the Public Health Service is not eligible to enter into a service agreement for retention special pay when he is satisfying a pre-existing service obligation incurred as the result of financial assistance he received in medical school under the National Health Service Corps Scholarship Program.

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**Matter of: Thomas D. Matte, M.D.—Public Health Service Medical Officer—Retention Special Pay**

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Dr. Thomas D. Matte claims additional special pay, commonly referred to as "retention" special pay, in the amount of \$9,000 per year during the period of his active duty as a medical officer of the Public Health Service (PHS).<sup>1</sup> In light of the facts presented, and the applicable provisions of law, we conclude that his claim should be denied.

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<sup>1</sup> This action is in response to correspondence received from Dr. Matte requesting reconsideration of the denial of his claim by the PHS, and by the Claims Group of our Office.

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## Background

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From September 1977 through April 1980, and from April 1981 through May 1982, Dr. Matte received financial assistance under the National Health Service Corps (NHSC) Scholarship Program while he attended medical school. He thereby incurred a commitment to perform a 4-year "period of obligated service" as a member of the NHSC in a "health manpower shortage area."

Following his graduation from medical school in May 1982, Dr. Matte received a 2-year deferral of his NHSC Scholarship Program service obligation while he participated in a residency program in internal medicine. Upon completing the residency program in 1984, he received grants under the National Research Service Award (NRSA) program to enable him to study epidemiology at the Harvard University School of Public Health, and he received a further deferral of his NHSC Scholarship Program service obligation while he continued his education under that award program.

Dr. Matte studied epidemiology under the NRSA program from September 1984 through June 1986. He then accepted an appointment as a medical officer with the Commissioned Corps of the PHS. Following his appointment, he reported for duty on July 7, 1986, at the PHS National Institute for Occupational Safety and Health, Atlanta, Georgia. His assignment entailed research and teaching in the field of epidemiology. He is satisfying his NHSC service obligation by performing 4 years of teaching and research activities in that assignment.

The PHS offered Dr. Matte that assignment in April 1986. At that time he was advised that he would receive annual pay and allowances as a PHS medical officer in a total amount of approximately \$42,000 per year, including \$9,000 per year in retention special pay. Shortly before he was scheduled to report for duty in Atlanta in July, however, the PHS advised him that he was not eligible for retention special pay because of his pre-existing service commitment. Dr. Matte entered on duty as a PHS medical officer in Atlanta in July 1986, and he has been serving in that capacity as a research epidemiologist since then.

In August 1987, Dr. Matte filed a claim for retention special pay with the Claims Group of our Office. Our Claims Group denied his claim in April 1988, and he subsequently requested a further review of the matter and a final administrative decision.

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## Issue

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Dr. Matte's claim was previously denied on the basis of a determination made by the Office of the Secretary of the Department of Health and Human Services, and the Claims Group of our Office, that under the applicable laws PHS medical officers who are providing obligated service incurred under the NHSC Scholarship Program are ineligible for retention special pay.

Dr. Matte acknowledges that he is satisfying the 4-year service obligation he incurred under the NHSC Scholarship Program through his service as a PHS

medical officer. Nevertheless, he notes that he is not providing this service through clinical practice in a "health manpower shortage area," but rather through teaching and research at the National Institute for Safety and Health under the authority of 42 U.S.C. § 254m(e). He argues that under the applicable provisions of law he is therefore eligible for the retention special pay at the rate of \$9,000 per year. In the alternative, he argues that he should be allowed payment on the basis of the offer made to him in April 1986, which was later retracted, that his annual salary would include the retention special pay.

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## Applicable Laws

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Provisions of law governing the NHSC program, and the retention special pay entitlements of PHS medical officers, are contained in title 42 of the United States Code. Retention special pay in the amount of \$9,000 per year is authorized for PHS medical officers with less than 10 years' service who execute written agreements to remain on active duty for a period of not less than 1 year.<sup>2</sup> However, 42 U.S.C. § 210(a)(2)(B) imposes the following limitation:

(B) A commissioned medical officer in the Regular or Reserve Corps (other than an officer serving in the Indian Health Service) may not receive additional special pay . . . for any period during which the officer is providing obligated service under . . . section 254m of this title . . . .

Under 42 U.S.C. § 254m individuals with NHSC Scholarship Program service obligations are generally required to perform their obligated service through clinical practice in "health manpower shortage areas."

Subsection (e) of 42 U.S.C. § 254m further provides, however, that:

Notwithstanding any other provision of this subchapter, service of an individual under a National Research Service Award . . . shall be counted against the period of obligated service which the individual is required to perform under the Scholarship Program.

The legislative history of this provision indicates that it was designed to strengthen the nation's medical research and teaching programs, and it authorizes individuals who receive NRSA grants to perform their NHSC service obligations through activities involving medical research or teaching following their period of study under the NRSA program.<sup>3</sup>

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## Discussion And Conclusion

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As indicated, 42 U.S.C. § 210(a)(2)(B) prohibits a PHS medical officer from entering into a retention special pay agreement "for any period during which the officer is providing obligated service under . . . section 254m of this title . . . ." In our view, this precludes a PHS medical officer with a preexisting NHSC Scholarship Program service obligation from receiving the special pay regardless of whether the officer is satisfying that obligation through clinical practice in "health manpower shortage areas" as generally required by section 254m, or

<sup>2</sup> 42 U.S.C. § 210(a); 37 U.S.C. § 302(a)(4).

<sup>3</sup> H.R. Rep. No. 208 (Conference), 97th Cong., 1st Sess. 802-804 (1981). See also 42 C.F.R. § 62.8(f).

through medical research and teaching as specifically authorized by subsection (e) of that section. In either case, the officer “is providing obligated service . . . under section 254m,” and our view in that the plain wording of 42 U.S.C. § 210(a)(2)(B) thus operates to bar eligibility for retention special pay. Hence, we are unable to agree with the argument advanced by Dr. Matte in this case that he should be allowed retention special pay on the basis that he has been authorized under 42 U.S.C. § 254m(e) to satisfy his service obligation and the NHSC Scholarship Program through medical research and teaching instead of through clinical practice.

As to Dr. Matte’s suggestion that the PHS should nevertheless be bound by the advice it furnished him in April 1986 that he would be eligible for retention special pay, it has long been held that the receipt of information, later established to be erroneous, by one dealing with a government official does not afford a legal basis for a payment from appropriated funds.<sup>4</sup> It is also well settled that the pay entitlements of members of the uniformed services are governed exclusively by statute, and that common law rules concerning employment contracts are not applicable.<sup>5</sup> Thus, the fact that Dr. Matte was misled or misinformed by the PHS about his entitlement to retention special pay under the applicable statutes cannot properly afford a legal basis for payment of the special pay to him.

Accordingly, we sustain the denial of Dr. Matte’s claim.

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**B-233285, March 6, 1989**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Forum election

The fact that protest is first filed with General Services Administration Board of Contract Appeals and dismissed without prejudice for lack of jurisdiction does not preclude subsequent filing at General Accounting Office within 10 days of when protester originally learned its basis for protest.

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<sup>4</sup> See *Federal Crop Insurance Corporation v. Merrill*, 322 U.S. 380 (1947); *Parker v. United States*, 198 Ct. Cl. 661 (1972); and 56 Comp. Gen. 943, 950 (1977).  
<sup>5</sup> *United States v. Larionoff*, 431 U.S. 864, 869 (1977); *Bell v. United States*, 366 U.S. 393, 401 (1961); 64 Comp. Gen. 67, 68 (1984).

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## **Procurement**

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### **Contractor Qualification**

#### **■ Responsibility criteria**

#### **■ ■ Distinctions**

#### **■ ■ ■ Performance specifications**

Protest that awardee's proposal did not meet solicitation requirement that contractor personnel possess top secret security clearance is denied since clearance is a contract performance requirement and the agency reasonably was satisfied that the awardee would meet the requirement.

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### **Matter of: Telos Field Engineering**

Telos Field Engineering protests the award of a contract under request for proposals (RFP) No. F25606-88-R-0034 issued by the 3908th Contracting Squadron, Offutt Air Force Base, Nebraska. Telos contends that the Air Force improperly evaluated the proposal of the awardee, Storage Technology Corporation (StorageTek), or improperly determined it to be responsible, because it allegedly did not offer to meet, nor could it meet, certain requirements of the RFP.

**We deny the protest.**

This solicitation was for the maintenance of an International Business Machines (IBM) 3081 computer and its peripheral equipment for a base year (October 1, 1988, through September 30, 1989) and 4 option years. The RFP contemplated the award of a firm, fixed-price contract to the lowest-priced offeror whose technical proposal met the government's minimum requirements. Those requirements were set forth in Section C of the RFP, the Statement of Work (SOW).

Of relevance to this protest, Section 3 of the SOW, "Responsibilities of the Contractor," provided that the contractor would be responsible for scheduled maintenance, 0700 to 1600 hours, Monday through Friday, with a maximum response time of 2 hours after notification. The contractor was also responsible for on-call, remedial maintenance 24 hours a day, 7 days a week and was required to arrive and begin repairs within 2 hours. Under Section 9, "Security," the SOW stated in part that "All contractor personnel shall have a TOP SECRET clearance based upon a special background investigation [SBI], prior to performance of this contract."

The RFP did not require the submission of particularly complex proposals. According to the RFP's proposal preparation instructions, among other submissions, each proposal was to contain "a resume for each prospective technician to include a statement that the individual either has the required security clearance, or will obtain the required security clearance by the contract start date."

On the closing date of September 9, 1988, proposals were received only from the protester, who was the incumbent maintenance contractor, and StorageTek. In its initial proposal, StorageTek stated that it was qualified to maintain, support, and service IBM products and agreed to the 2-hour response time requirements of the SOW. It furnished resumes of the personnel who would perform the con-

tract and agreed to provide the appropriate security clearance. Although it did not identify those personnel who currently had the required security clearance, it agreed to furnish that data upon contract award or earlier if required.

During discussions with StorageTek on September 16, the agency stated, among other matters, that it was not certain StorageTek understood the security requirements. The Air Force requested that StorageTek forward, as soon as possible, the needed security documents (top secret clearance with SBI access).

In its September 23 best and final offer (BAFO) StorageTek listed the names of employees in its Omaha office who had once held security clearances within the government. It also stated that these employees would be reapplying for a top secret, SBI clearance upon award. Four of the five employees listed had held top secret clearances and the fifth had held a secret clearance.

StorageTek's price was the lowest and on September 29, the contracting officer determined the firm to be responsible based on general criteria of responsibility, i.e., that the firm had the financial capability, qualified personnel, and equipment necessary to perform the contract, and a satisfactory record of past performance.

According to the contracting officer, on October 5, prior to contract award, he requested of StorageTek by telephone information on personnel with proper clearance who could maintain the computer equipment until final clearances were obtained for the proposed Omaha office employees. StorageTek provided the name of one individual. The contracting officer also ascertained from the base's computer project officer that contractor employees could be escorted until security access authority was granted.

Later on October 5, the contract administrator called StorageTek to notify it of the award. He also requested security information on the personnel who would be sent so that he could arrange for base access. When, on the same day, Telos was notified of the award, it alleged that StorageTek had no personnel in the area who had the required clearance, who were qualified to maintain the equipment, or who could meet the 2-hour response time requirement. Telos indicated it would protest the award.

After consultation, the contracting officer and the contract administrator called StorageTek to request the name of the cleared person, so that clearance could be verified. They also asked whether the person was qualified and whether StorageTek could in fact meet the 2-hour response requirement. The StorageTek representative stated that the company had properly cleared personnel working with the Pentagon and the National Aeronautics and Space Administration.

By telecopy on October 6, StorageTek furnished the name of one technician, her resume, and a statement of her qualification to repair IBM equipment. By letter of October 6, received October 12, StorageTek furnished the same information plus the name and resume of an additional, cleared technician. On the basis of this information, the agency did not terminate the contract.

Telos filed a protest of the award with the General Services Administration Board of Contract Appeals (GSBCA). However, after a telephonic conference on October 18, the GSBCA learned that the procurement was exempt from the Brooks Act pursuant to 40 U.S.C. § 759(a)(3)(C)(iii), (v) (Supp. IV 1986) and thus dismissed the Telos protest without prejudice, for lack of jurisdiction. See 40 U.S.C. § 759(f) (Supp. IV 1986). On October 20, Telos filed its protest with our Office. Since Telos's protest was not filed within 10 calendar days of award, performance of the contract was not suspended. See Federal Acquisition Regulation (FAR) § 33.104(c)(5) (FAC 84-32).

As a preliminary matter, the Air Force argues that the protest should be dismissed because Telos's initial choice of the GSBCA precludes it from filing a protest with our Office.<sup>1</sup> As support, the Air Force relies upon certain provisions of the Competition in Contracting Act of 1984 (CICA) and urges us to reverse, as erroneous, our decision in *Idaho Norland Corp.*, B-230598, June 6, 1988, 88- 1 CPD ¶ 529, which is contrary to its position.

Under CICA, an interested party who has filed a protest with the GSBCA "may not file a protest with respect to that procurement" at the General Accounting Office (GAO) 31 U.S.C. § 3552 (Supp. IV 1986). Similarly, 40 U.S.C. § 759(f) (Supp. IV 1986) provides that an interested party who files a protest with our Office "may not file a protest with respect to that procurement" at the GSBCA. Our Bid Protest Regulations repeat the statement in 40 U.S.C. § 759(f), but also provide that "[a]fter a particular procurement . . . is protested to the [GSBCA], the procurement may not, *while the protest is before the [GSBCA]*, be the subject of a protest to the [GAO]." (*Italic added.*) 4 C.F.R. § 21.3(6) (1988). None of these authorities prohibits our consideration of Telos's protest in view of the specific circumstances presented here.

Telos erroneously filed its protest with the GSBCA and, when it was dismissed without prejudice, expeditiously filed its protest with our Office within the first 10 working days after it knew of its protest basis. Under similar circumstances we concluded that we could consider the protest in *Idaho Norland Corp.*, B-230598, *supra*, 88-1 CPD ¶ 529 at 2, note 1, and we are not persuaded that our conclusion was incorrect. It is plain that the applicable statutes and our Regulation were designed to prevent protesters from maintaining duplicate actions in separate forums. However, they do not stand for the proposition that by filing first in one forum, a protester, such as Telos in this case, has made a final election which it may not subsequently change by timely filing in the other forum.

The facts of this case are distinguishable from others in which we have discussed the concept of a final election. In *System Automation Corp.*, B-224166, Oct. 29, 1986, 86-2 CPD ¶ 493, the protester first filed with our Office more than a year after learning its protest basis. The protester had earlier filed with the GSBCA and had its protest sustained only to have the decision reversed when

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<sup>1</sup> The Air Force also contended that Telos's protest was untimely because it believed the protest was not filed until October 21, 11 working days after the basis of protest was known. This contention is without merit since the record clearly reflects that the protest was filed on October 20, the tenth work day.

the Court of Appeals for the Federal Circuit held that the GSBICA lacked jurisdiction to decide the matter. In dismissing the protest as untimely, we reasoned that CICA contemplated that a protester would make a final election between the GSBICA and our Office when both forums are available, and that it would be inconsistent to permit a protester to use an initial filing with the GSBICA as a means of preserving its right to be heard at our Office when it later protests in an untimely manner. The protester in *TAB, Inc.*, 66 Comp. Gen. 113 (1986), 86-2 CPD ¶ 639, sought to avoid the outcome of *System Automation*, by timely filing both with the GSBICA and with our Office in the event the GSBICA determined it had no jurisdiction. We dismissed the protest, noting the intent of CICA that a protester make an election (*Resource Consultants Inc.*, 65 Comp. Gen. 72 (1985), 85-2 CPD ¶ 580) and the impropriety of our considering a matter actively being litigated before the GSBICA (*Analytics Communication System*, B-222402, Apr. 10, 1986, 86-2 CPD ¶ 356). Telos is not maintaining dual actions in separate forums as in *TAB*, nor is it untimely as in *System Automation*. Thus, we perceive no reason why we should not consider Telos's protest on the merits.

The essence of Telos's protest is that the award to StorageTek was improper because that firm had failed to demonstrate, prior to award, that it had available in the Omaha area security-cleared personnel capable of maintaining an IBM 3081 system on a 2-hour response basis. The protester approaches this contention from two different theoretical standpoints: as a failure of the contracting officer to properly evaluate StorageTek's proposal and as a failure to apply definitive responsibility criteria in the RFP.

As for the latter, we point out that requirements in a solicitation's SOW, such as those identified by Telos, concern the contractor's performance obligations, and not its ability to perform, and thus are not definitive criteria of responsibility. See *Cumberland Sound Pilots Association—Request for Reconsideration*, B-229642.2, June 14, 1988, 88-1 CPD ¶ 567. The ability to meet specification requirements is encompassed by a contracting officer's subjective responsibility determination, to which we will object only upon a showing of bad faith, which has not been made here. *Telos Field Engineering*, B-233250, Nov. 8, 1988, 88-2 CPD ¶ 462 (protest of award of contract for computer maintenance services on basis that awardee did not offer properly trained and experienced personnel as required by RFP's SOW dismissed because it did not concern definitive responsibility criteria).

As for the evaluation of proposals with respect to those SOW requirements concerning the offeror's qualifications to maintain the computer equipment and obligation to respond within 2 hours after notice of a maintenance need, our review of the record does not reveal any basis for questioning the Air Force determination that StorageTek's proposal was acceptable. In fact, both of the offerors here not only committed themselves to fulfill requirements such as the 2-hour response time, but presented themselves as experienced, well-established providers of maintenance service for IBM equipment on a national basis including classified locations. Likewise, we find that the Air Force reasonably determined that StorageTek could meet the security clearance requirement.

Although StorageTek's proposed employees did not possess updated top secret clearances, StorageTek had promised to obtain the required clearances upon contract award. Further, prior to award, the contracting officer had ascertained that StorageTek had properly cleared personnel to perform the contract until the proposed staff obtained their clearances. StorageTek furnished the name of one such employee prior to award and supplied two names shortly after award. In view of the proposal's specific authorization for substitution of personnel, we find nothing objectionable in the Air Force's acceptance of StorageTek's plan to use temporary personnel pending final clearances for the proposed staff.

Accordingly, the protest is denied.

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**B-233372, March 6, 1989**

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**Procurement**

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**Competitive Negotiation**

■ **Offers**

■ ■ **Personnel experience**

■ ■ ■ **Contractor misrepresentation**

Protest is sustained in part where awardee failed to disclose material changes in the availability of its proposed key personnel which occurred between the submission of initial and best and final offers.

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**Matter of: Omni Analysis**

Omni Analysis protests the award of a cost-plus-fixed-fee contract for a base year with three 1-year options to Advanced Technology, Inc. (ATI), under request for proposals (RFP) No. N60921-88-R-0113, issued by the Naval Surface Warfare Center for training support services. The protester objects to the agency's evaluation of technical and cost proposals.

We sustain the protest.

The RFP was issued on February 29, 1988, and provided that cost considerations would be secondary to considerations of technical competence in the selection of an offeror. Technical aspects were to be evaluated on the basis of three factors: (1) personnel, and (2) management and understanding, which were equal in importance, and (3) corporate experience, which was least important. Although performance was scheduled to begin with six key personnel and build up to a maximum level of 18 individuals some time beyond the base contract year, offerors were required to provide resumes for all 18 key personnel positions and proposals were evaluated with respect to all 18 positions. In addition, the RFP stressed the importance of demonstrating the availability of proposed key personnel as it specifically required offerors to submit signed letters of intent from individuals proposed who were not presently in their employ.

Seven initial proposals were submitted by the April 28 closing date. ATI and Omni were determined to be in the competitive range. During the technical

evaluation, ATI received a score of 875 out of a maximum possible 1,000 points; Omni's score was 800. The primary technical difference between the proposals was in the area of proposed personnel. ATI's entire personnel team was found to be strong. While Omni's basic personnel team was found to be strong in several areas, the future availability of its other key personnel was questioned. ATI's proposed costs were \$3,823,019; Omni's were \$4,058,163. Following discussions, offerors were requested to submit best and final offers (BAFOs) by August 26.

ATI made no changes to its technical proposal. While Omni provided further technical explanation as requested during discussions, a reevaluation resulted in no scoring changes to either offeror's technical proposal. ATI reduced its proposed costs to \$3,635,015 and these were regarded as realistic by the agency; Omni reduced its proposed costs to \$3,313,882 but, due mainly to the Navy's concerns about Omni's large reduction in its direct labor costs, the agency adjusted them upwards to a figure of \$3,899,715.47. Award was made to ATI on October 18.

Omni questions the technical and cost evaluations on several grounds. However, the primary basis of Omni's protest is that, by the time ATI submitted its BAFO, 3 of the 18 individuals identified in its original proposal, and for which the firm had received evaluation credit under the heavily-weighted personnel factor, had left its employ. Omni argues that, in failing to apprise the agency of the employees' departures in its BAFO, ATI failed to conform to the RFP requirement that letters of intent be submitted by those proposed but not currently employed by the offeror and knowingly misled the Navy as to the identity and availability of persons it was proposing.

Both ATI and the agency concede that two of the individuals mentioned by Omni had, in fact, left the awardee's permanent employ prior to the submission of BAFOs. With respect to the first individual—a highly-rated technical librarian scheduled to be among the first six individuals to commence performance—both the agency and the awardee state that since an admittedly less competent but nonetheless adequate substitute librarian was finally provided from among the 18 individuals originally proposed by ATI, the awardee's failure to amend its BAFO was immaterial. With respect to the second individual—an analyst not scheduled among the six to begin performance—the awardee first reported that the individual had not, in fact, left ATI's employ as alleged, but subsequently amended this position to indicate that he had departed. Both the awardee and the agency now argue that this departure was immaterial because the individual was not among the first group of employees scheduled to commence performance during the base year.<sup>1</sup>

<sup>1</sup> The explanation regarding the third individual of concern to Omni—an analyst scheduled to commence performance upon award—was that he was temporarily laid off after the submission of initial proposals with a verbal understanding that he would rejoin active employment upon contract award. The record indicates that this individual gave ATI a letter of intent after it had submitted its BAFO but before award; while this may indicate that ATI was not in technical compliance with the RFP requirement for a letter of intent, we do not believe that any prejudice resulted because ATI's proposal was evaluated on the basis of this individual's availability, the letter of intent was submitted before award and the individual is in fact performing as originally proposed.

Where an offeror knows prior to submission of BAFOs that proposed key employees are no longer available, the appropriate course of action is to withdraw the individuals and propose substitutes who will be available. *See Informatics General Corp.*, B-224182, Feb. 2, 1987, 87-1 CPD ¶ 105. To do otherwise is, in effect, to misrepresent the availability of proposed personnel, a circumstance which impermissibly compromises the validity of the technical evaluation, notwithstanding the fact that post-award substitutions of key personnel may later be made and approved by the agency pursuant to a clause in the awardee's contract. *Ultra Technology Corp.*, B-230309.6, Jan. 18, 1989, 89-1 CPD ¶ 42. This is particularly true where, as here, the factual accuracy of an offeror's submissions may have had a material influence on the evaluation of the proposals. *Informatics, Inc.*, 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53.

Here, the record shows that two of the individuals proposed by ATI were no longer available to perform after submission of its initial offer; yet ATI's BAFO did not reflect this fact and actually contained continued assurances that the personnel team it had originally proposed remained intact.

It is not clear whether the selection decision would have been different had ATI's BAFO accurately reflected the personnel available for this contract. ATI had a 75-point advantage in technical score, as well as a cost advantage of approximately \$264,000; it thus appears that ATI's technical score would have had to be significantly reduced for the selection decision to have been different. On the other hand, technical competence was weighted higher than cost, personnel was one of the two most heavily weighted technical evaluation criterion, and it is clear from the evaluation record that the evaluators thought highly of the two individuals ATI proposed, particularly the librarian, who in fact were not available for this contract.

Moreover, the evaluation was based on 18 proposed employees, not some lesser number, and the evaluators specifically noted that ATI was strong in the area of personnel availability since all 18 of ATI's proposed key people actually worked for ATI; how the evaluators would have reacted to whatever ATI would have proposed as replacements for the two individuals originally proposed is, of course, not known, but it does seem apparent that the evaluators would have been less impressed with substitute personnel. Furthermore, while the agency and ATI argue that the loss of the proposed analyst was immaterial because he was not among those scheduled to work under the contract during the base year, we simply point out again that in the evaluation no distinction was made between employees scheduled to begin work immediately and those who were to start later—the evaluation of personnel took into account all 18 key people. In effect, ATI proposed only 16 key personnel when the RFP required offerors to propose 18 such individuals, while the agency believed it was evaluating 18 individuals who were in fact available for the contract.

We also find no merit to ATI's argument that it did all that was required by the RFP because, when it submitted its initial proposal in April 1988, "all eighteen proposed individuals were employees of ATI," and that personnel substitutions could be made during contract performance under the Key Personnel Require-

ments Clause. Given the evaluation emphasis on proposed personnel, we do not believe an offeror can rely on such a clause as a substitute for the fact that some of its proposed key people will not be available.

Accordingly, we conclude under the circumstances of this case that the award to ATI was improper and we sustain the protest on this basis.<sup>2</sup> See *Ultra Technology Corp.*, B-230309.6, *supra*.

Since base period performance is underway, we will not disturb the award at this point. However, in light of our concern about what happened here and its effect on the integrity of the procurement system, we are recommending that the options in ATI's contract not be exercised. We also find that the protester is entitled to recover its reasonable costs of filing and pursuing this protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.

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## **B-233759, March 6, 1989**

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### **Procurement**

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#### **Contract Management**

##### **■ Contract administration**

##### **■ ■ Options**

##### **■ ■ ■ Use**

##### **■ ■ ■ ■ GAO review**

When agency's exercise of an option is based on an informal price analysis that considered the prices offered under the original solicitation, market stability and other factors, protest that price analysis is insufficient is without legal merit.

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### **Procurement**

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#### **Contract Management**

##### **■ Contract administration**

##### **■ ■ Options**

##### **■ ■ ■ Use**

##### **■ ■ ■ ■ GAO review**

Agency is not required to consult previous unsuccessful offeror during price analysis, nor is the agency required to issue a new solicitation to test the market before exercising an option merely because a previous offeror states that it would offer a lower price, when prices have already been tested in a fully competitive procurement in which the protester participated.

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<sup>2</sup> We have reviewed the remainder of the agency's technical evaluation and its cost evaluation in the context of Omni's other protest allegations and find that they were conducted reasonably.

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## Procurement

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### Noncompetitive Negotiation

#### ■ Use

#### ■ ■ Justification

#### ■ ■ ■ Urgent needs

While an urgency determination was not required in order for the agency to exercise an option, the existence of a critical equipment need for outfitting ships in battlefield threat areas, in conjunction with the fact that the awardee is the only firm currently producing the item and the only firm which would not need to submit a first article prior to production provides a reasonable basis for an urgent sole-source award.

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### Matter of: Kollsman Instrument Co.

Kollsman Instrument Co. protests an award by the Department of the Army (on behalf of the Navy) of an option to Brunswick Corp., for the purchase of 284 AN/KAS-1 chemical warfare detectors under contract No. DAAH01-87-CA011. We deny the protest.

The basic contract was awarded to Brunswick on October 3, 1986, for 267 production units and 4 first article test units, as the result of a full and open competition in which Kollsman and Brunswick were the two offerors. Brunswick received the award at a price of \$47,674 per unit for the basic quantity, and offered the same price for 304 option units. Kollsman's offer was \$61,169 per unit for the basic quantity, with an option price of \$67,179 per unit. Brunswick received the award on the basis of its lower unit price for the basic quantity. The option prices were not evaluated because of the unavailability of funding; however, as indicated above, Brunswick's price advantage was even more substantial for the option units than it was under the basic award.

Kollsman contends that the price of this unit has decreased significantly since the original award, and that it could now offer the unit at a lower price than Brunswick's option price. Kollsman asserts that since the Army did not consult Kollsman about current pricing prior to exercising the option, the Army did not conduct a proper informal price analysis or market evaluation to determine that the option price is the most advantageous to the government, as is required under Federal Acquisition Regulation (FAR) § 17.207(d)(2) (FAC 84-37). In addition, since the option was not evaluated under the initial competition, Kollsman asserts that FAR § 17.207(f) prevents its exercise, absent an appropriate justification and authorization that full and open competition is not required. The Army has made such a determination under FAR § 6.302-2 (FAC 84-28), on the basis that unusual and compelling urgency resulted from a need to protect Navy ships against the threat of lethal chemicals presented by potential enemies of the United States, and only Brunswick is in a position to meet the needed delivery timetable to permit the Navy to achieve its critical ship deployment schedules. In particular, the Army found that Brunswick is the only current producer of the unit which had satisfied the first article test, and that satisfaction of the first article test by a new producer, along with gearing up for production would add more than 1 full year to the delivery schedule.

Kollsman argues that there was no urgency, that as the producer for the government of a very similar unit, the AN/UAS-12C night vision sight, Kollsman could have passed the first article test and commenced production in a substantially reduced time period and, in the alternative, that if there was any urgency, it was the result of a lack of advance planning on the part of the Army.

Our Office generally will not question the exercise of an option unless the protester shows that applicable regulations were not followed or that the agency's determination to exercise the option, rather than conduct a new procurement, was unreasonable. *Automation Management Corp.*, B-224924, Jan. 15, 1987, 87-1 CPD ¶ 61. The intent of the regulations is not to afford a firm that offered high prices under an original solicitation an opportunity to remedy this business judgment by undercutting the option price of the successful offeror. *ISC Defense Systems, Inc.*, B-224564, Feb. 17, 1987, 87-1 CPD ¶ 172. While it may be appropriate in certain circumstances for a contracting officer to contact all available sources to determine whether an option price is most advantageous, such a procedure is not mandated by regulation. *Action Manufacturing Co.*, 66 Comp. Gen. 463 (1987), 87-1 CPD ¶ 518. The FAR grants contracting officers wide discretion in determining what constitutes a reasonable check on prices available in the market. *Id.*

Further, a contracting officer is not required to test the market by resoliciting before exercising an option merely because a competitor guarantees a lower price after the option exercise, where the option prices have already been tested in a competition in which that firm participated. Such a firm is not entitled to a second chance merely by its promise to offer a lower price. *Jaxon, Inc.*, B-213998, July 10, 1984, 84-2 CPD ¶ 33; *A.J. Fowler Corp.*, B-205062, June 15, 1982, 82-1 CPD ¶ 582. Accordingly, we find that the Army's decision to consider the prices under the original competitive procurement, in conjunction with its assessment that the market pricing for items of similar technology had remained stable over the past 2 years, without consulting Kollsman or testing the market, constituted a reasonable basis to determine that the option price was most advantageous to the government.

In any event, we also find that the urgency determination was reasonable. Under the Competition in Contracting Act of 1984 (CICA), an agency may use other than competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). When citing an unusual and compelling urgency, the agency is required to request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e). An agency, however, has the authority, under 10 U.S.C. § 2304(c)(2), to limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. *Arthur Young & Co.*, B-221879, June 9, 1986, 86-1 CPD ¶ 536. We will not object to the agency's decision to limit competition based on an unusual and compelling urgency unless we find that the agency's decision lacks a reasonable basis. *Honeycomb*

*Co. of America*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209. We have recognized that a military agency's assertion that there is a critical need for certain supplies carries considerable weight, and the protester's burden to show unreasonableness is particularly heavy. *Abbott Products, Inc.*, B-231131, Aug. 8, 1988, 88-2 CPD ¶ 119.

Here, the Army complied with the statutory requirements under CICA calling for written justification for, and higher-level approval of, the sole-source action. The Army states that the units are critical to properly outfit all Navy ships operating in potential threat areas where countries possess chemical warfare weapons. The present system of transferring units between ships is considered an unacceptable alternative because of the increased danger of unit damage associated with the unit transfer, plus other operational difficulties which are posed. Accordingly, there is a critical current need for the units being acquired under the option exercise. Kollsman has not provided any credible evidence that this determination was unreasonable, or that the urgency resulted from any lack of advance planning on the part of the agency.

To the extent that Kollsman is asserting that it could, in fact, provide the units within the required time frame, the Army points out that the bulk of the delay (1 year) results from the first article test requirement, for which Kollsman concedes it is not entitled to a waiver. Regarding Kollsman's argument that this time will be substantially reduced because it produces a similar unit, the Army points out that while there are many common parts, there are significant functional differences between the two units, and there is no assurance of a shortened first article test period. In this regard, we recently considered a protest regarding these two units in which the positions of Brunswick and Kollsman were reversed. Brunswick argued that it was either entitled to a first article waiver on the AN/UAS-12C because of its experience in producing the AN-KAS-1, or, in the alternative, that it would it could substantially accelerate the time necessary for first article testing. We rejected this argument on the basis that it would require the agency to assume the risk that the offeror could successfully complete first article testing in time to meet the delivery and deployment schedule, which we found inappropriate in view of the technical complexity of the items and the need to meet an existing battlefield threat. *Brunswick Corp., Defense Division*, B-231996, Oct. 13, 1988, 88-2 CPD ¶ 349. The identical considerations obtain here and require the rejection of Kollsman's argument in this respect.

The protest is denied.

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Telephones

The National Park Service may use appropriated funds to install private telephone service in residence of employee who was required to temporarily vacate his government-furnished residence for about 2-1/2 months during renovation. It is doubtful that Congress intended to preclude payment in such cases when enacting 31 U.S.C. § 1348(a)(1) (1982), which generally prohibits the payment of any expense in connection with telephone service installed in a private residence. *Airman First Class Vernell J. Townzel*, B-213660, May 3, 1984, overruled.

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**Matter of: Timothy R. Manns—Installation of Telephone Equipment in Employee Residence**

This decision is in response to a request from Mr. Mark D. Hooper, Certifying Officer, Rocky Mountain Regional Office, National Park Service, U.S. Department of the Interior. Mr. Hooper requests a decision regarding the propriety of using appropriated funds to install a telephone in the temporary residence of Mr. Timothy R. Manns, a National Park Service employee, and subsequently to reinstall a telephone in Mr. Manns's permanent residence. For the reasons set forth below, we conclude that appropriated funds may be used for these purposes.

Mr. Manns was forced to vacate his government quarters temporarily for needed repairs. The Park Service has paid the cost of moving the employee's household goods from one set of quarters to another as administrative costs of operating the installation, but questions whether it may pay certain telephone charges on the same basis. The costs at issue here were charges by the telephone company to move Mr. Manns's personal telephone to temporary government quarters on January 2, 1987, and to return it to his permanent quarters on March 18, 1987, each at a cost of \$41.25.

The use of appropriated funds to install telephones in private residences is prohibited generally by 31 U.S.C. § 1348(a)(1) (1982), which provides:

Except as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences.

The statute generally constitutes a mandatory prohibition against the use of appropriated funds to pay any part of the expense of furnishing telephone service to an employee in a private residence. *See* 59 Comp. Gen. 723 (1980), and cases cited therein.<sup>1</sup> Although the statute is strictly applied, there have been in-

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<sup>1</sup> The certifying officer notes that the Park Service does have limited authority under 16 U.S.C. § 17j-2(i) to pay for official telephone service installed in private houses when authorized under regulations issued by the Secretary of the Interior. Since the service in the present case is personal, not official, this authority does not apply.

stances in which we have determined that the prohibition did not apply when the expense was incurred as a result of government action over which the individual had no control. For example, one case involved the closing of an Air Force-operated mobile home park and the relocation of Air Force members' mobile homes to a new location which was directed at government expense. We concluded that 31 U.S.C. § 1348(a) did not preclude reimbursement of the service members' telephone reconnection charges at the new location. *Technical Sergeant Ezra Foster*, 56 Comp. Gen. 767 (1977). We observed that:

[w]hile the statute was intended to preclude any possibility of the Government bearing the costs of telephone service in private residences, it is questionable that the Congress intended to preclude the reimbursement of telephone reconnection charges caused by Government action. . . . We do not believe that in enacting this law the Congress intended to preclude an individual from being reimbursed for an expense incurred as a result of Governmental action over which he had no control. 56 Comp. Gen. at 768.

In a later case, however, which involved a situation very similar to that of Mr. Manns, we held that reimbursement of telephone charges was prohibited. In that case, *Airman First Class Vernell J. Townzel*, B-213660, May 3, 1984, an Air Force member was required to vacate his government quarters while they were being renovated and to move to temporary quarters for a 3-month period. During the 3-month period, the service member paid the monthly service charges on his telephone in the quarters under renovation since that was less than the disconnecting and reconnecting charges would have been. Some limited use of official telephone service to make outgoing calls was available to the member at the temporary quarters, and he could continue to charge toll calls to the service in his permanent quarters. We held that reimbursement for reconnection of telephone service in the temporary quarters was not appropriate and, likewise, reimbursement for continued service in the quarters being renovated was not appropriate. We distinguished the *Foster* case primarily on the basis that *Foster* involved a permanent relocation whereas in the *Townzel* case the occupancy of the quarters was temporarily interrupted for only a relatively short period.

As a result of the present request for advance decision in Mr. Manns's case, we have reconsidered the distinction drawn in the *Townzel* case. Upon further reflection, we do not find that the distinction between a permanent relocation and a temporary relocation is valid where in both cases the individual is being required to relocate from government housing facilities through government action over which he has no control. Therefore, that distinction will no longer be made, and *Airman First Class Vernell J. Townzel*, B-213660, May 3, 1984, is overruled.

Accordingly, in Mr. Manns's case reimbursement for telephone connection and reconnection charges may be made on the same basis as for other utility connection charges.

**Military Personnel**

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**Travel**

- **Rental vehicles**
- ■ **Property damages**
- ■ ■ **Claims**
- ■ ■ ■ **Payments**

Direct payment may be made to car rental company on behalf of military member who rented the car where the car was damaged by another member operating it recklessly, and for personal business, but the government also should collect any amounts it pays the company from the member who caused the damage.

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**Matter of: Major J. P. Donato**

This advance decision responds to a series of questions concerning the liability for damages to a car properly rented from Avis by Marine Corps Major J. P. Donato, where the damages occurred while the car was being driven by another Marine on other than official business.<sup>1</sup> We conclude that the government properly may pay Avis directly for the damage, but then should pursue reimbursement for the payment from the driver.

Major Donato and five other Marines were ordered to perform temporary additional duty travel. As the senior officer, Major Donato received verbal authorization, later confirmed by a modification to his original orders, to rent a car during the temporary additional duty period.

Major Donato rented a car on August 30, 1987, and, in doing so, declined the Collision Damage Waiver contained in the rental agreement. Under the agreement, then, the government would pay for any damage to the car in view of the declination.

Later that evening, Major Donato left the car keys with two enlisted men so that they could leave the hotel for dinner. Shortly after midnight, a second officer traveling with the group requested the car keys from the enlisted men for the asserted purpose of finding a place to eat. This officer was unable to find an open restaurant and, instead, purchased a 12-pack of beer; after consuming some of the beer and while attempting to return the car to a parking place in front of the hotel, the officer ran the car through the hotel wall causing serious damage to the vehicle. The officer was arrested and eventually pled guilty of careless and reckless driving. Marine Corps authorities have determined that the officer was outside the scope of his employment and not in the line of duty with regard to this accident.

The car rental agency has filed a claim against Major Donato for the full amount of the damage, \$7,800, on the basis that it had no liability under the rental agreement in light of the cause of the accident. Major Donato, in turn,

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<sup>1</sup> The Per Diem, Travel and Transportation Allowance Committee has assigned PDTATC Control No. 88-11 to this case.

submitted a supplemental travel voucher for that amount requesting that the rental agency be paid directly on his behalf.

At the time of the incident that gave rise to the rental agency's claim, Avis and the Military Traffic Management Command (MTMC) had an agreement providing special privileges to all federal employees, including military members. Under this agreement, Avis initially assumed liability for all collision damage, including damage that otherwise would have been subject to a deductible. The agreement further provided that "the renter will be responsible for the full amount of damages if he violates any of the terms of the rental agreement; if he abuses the vehicle, drives it recklessly or while under the influence of alcohol and drugs."

The materials we have received from the Per Diem, Travel and Transportation Allowance Committee do not indicate an awareness of the MTMC-Avis agreement. Instead, the questions posed are premised on the view that the terms of the rental agreement signed by Major Donato control liability. Under both documents, the rental agency is not liable for damages that result from abuse of the vehicle, reckless driving, or driving while under the influence of alcohol or drugs.

The first question presented is whether direct payment may be made to Avis.

The determination of whether the government can pay Avis directly turns, in the first instance, on whether Major Donato, the authorized renter, should be relieved of liability even though the damage occurred while the car was being used for other than official purposes. In this respect, the Joint Federal Travel Regulations (JFTR) predicate government liability for a deductible amount (which may be discharged by reimbursement to the member or direct payment to the rental agency) on damage to the rented vehicle occurring in the course of official business. 1 JFTR para. U3415C2b. Our previous decisions likewise have focused on the vehicle's use at the time damage occurred to determine the issue of "official business." See 65 Comp. Gen. 253 (1986); B- 220779, Apr. 30, 1986; B-209951, June 7, 1983.

Neither the JFTR nor our decisions address the question of liability on the part of the person responsible for the use of the car where, as here, that person properly gave control of it to another authorized driver<sup>2</sup> who then acted in a manner that violated the rental contract. In such circumstances, we do not think the fact that the vehicle was damaged while being used on other than official business should be reason for the government to refuse to compensate the car rental company on behalf of the renter/innocent party.

The remaining questions for our consideration are whether the government disbursing officer, before settling the claim, should determine whether Major Donato's private insurance carrier made any payments to Avis, and whether the government should take steps to recover any amounts paid to Avis from the of-

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<sup>2</sup> Major Donato clearly was acting properly in giving the car to other members of his party so that they could go to a restaurant for dinner. See 65 Comp. Gen. 253 (1986).

ficer who caused the damage. We see no reason not to coordinate payment to Avis with Major Donato's insurance carrier, although we note there is nothing in the record to suggest that the carrier has been involved to date. Further, since the damage ultimately is the responsibility of the individual whose negligence, outside the scope of his duties, caused it, any amounts paid to Avis then should be collected from him. In this regard, the material submitted by the Committee reflects that the driver in fact has submitted a claim to his own insurance carrier, disposition of which apparently has been withheld pending this response.

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**B-233478, March 7, 1989**

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
  - ■ Terms
  - ■ ■ Time/materials contracts
  - ■ ■ ■ Costs
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**Procurement**

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**Contract Types**

- Time/materials contracts
- ■ Cost reimbursement

Under request for proposals for time and materials contract which specifically advises offerors not to propose any direct costs other than material and travel, and provides for payment for services based on fixed-labor rates, government is obligated to reimburse the successful offeror for expenses incurred in relocating its employees only to the extent that such costs are included in its labor rates.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
  - ■ Terms
  - ■ ■ Time/materials contracts
  - ■ ■ ■ Costs
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**Procurement**

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**Contract Types**

- Time/materials contracts
- ■ Cost reimbursement

Request for proposals (RFP), which estimates that 97 percent of work will be performed at the government site and 3 percent off-site, does not, contrary to protester's argument, permit an offeror to manipulate its level of effort so as to create an unrealistically low offer since the RFP requests only 1 hourly rate per labor category, which means that the successful offeror will be reimbursed at the same rate regardless of whether the work is performed at the government site or off-site.

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## **Matter of: Syscon Corporation**

Syscon Corporation protests request for proposals (RFP) No. N00140-88-R-1378, issued by the Department of the Navy for automated data processing (ADP) equipment support services at the Naval Underwater Systems Command in Newport, Rhode Island. Syscon contends that the RFP, as currently structured, improperly precludes potential offerors from identifying in that procurement certain direct costs, such as relocation expenses, which the Navy will be required to reimburse, and improperly fails to permit offerors to breakdown their offers into on-site and off-site work. We deny the protest.

The RFP contemplates the award of an indefinite delivery, indefinite quantity, time and materials contract to the offeror submitting the lowest-priced, technically acceptable proposal. The solicitation schedule contains estimates of the number of hours of performance required for each of the 18 labor categories for a base year and 2 option years and provides that proposals will be evaluated by multiplying the hourly rate proposed for each category by the estimated number of hours. The solicitation schedule establishes an estimate of \$20,000 as an evaluation factor for material and travel (which it specifically advises is not to include relocation costs), and offerors were instructed not to propose any direct costs. The RFP further provides that the government estimates that 97 percent of the work will be performed at the government site and 3 percent off-site. In this regard, the RFP warns offerors that the agency will not consider an offer which provides different rates in the same category for on-site and off-site work.

Syscon argues that offerors will be able to charge direct costs such as relocation and recruitment expenses against any contract awarded under the solicitation. Thus, the protester concludes that the solicitation is defective as it does not provide that offers should contain a break out of such costs and be evaluated based on those costs. The protester contends that by allowing its competitors to submit proposals that do not reflect the full extent of the costs that the government will actually pay, the Navy has unfairly eliminated a Syscon competitive advantage—its established labor force and on-site location.

The Navy responds that under the solicitation only material and travel costs will be directly reimbursable. The agency notes that it will reimburse the successful offeror for other direct costs, such as relocation, only to the extent that such costs are included in the fixed-labor rates proposed by the offeror.

Syscon responds that the accounting practices of many contractors as well as the Cost Accounting Standards preclude them from charging certain types of costs as anything other than a direct cost to the contract under which the costs are incurred. It apparently is the protester's position that if a contractor is precluded by its own accounting practices from factoring relocation and recruitment expenses into its labor rates, then the government must reimburse the contractor for those costs directly.

We do not agree. It is clear from the express terms of the RFP that payment will be made to the contractor for the services at the fixed-labor rates pre-

scribed in the RFP schedule, which are to include wages, indirect costs, general and administrative expense, and profit. Reimbursement is to be permitted for materials and travel costs only, along with indirect costs properly attributable to those two items. The fact that offerors such as Syscon do not believe that it is consistent with their accounting systems or the Cost Accounting Standards to consider relocation and recruitment expenses as indirect costs for purposes of including them in their fixed-labor rates does not make those costs separately reimbursable under this time and material type contract. The firm can either recover these expenses by including them in its fixed-labor rates or not recover them by failing to include them. We simply do not agree with the protester that expenses such as those resulting from relocation and recruitment are separately reimbursable under a contract awarded under this solicitation. Further, the RFP requirement is not inconsistent with the Cost Accounting Standards as it only informed offerors that they should include their costs other than materials and travel expenses in their labor rates in order to recover them; it does not define how such costs are to be classified for the purpose of the firms' accounting systems. See *A & E Industries, Inc., et al.*, 66 Comp. Gen. 523, 87-1 CPD ¶ 616.

The protester's second argument relates to the statement in the RFP that "[f]or proposal purposes, the government estimates that 97 percent of the proposed work will be performed at the government site and 3 percent off-site." Syscon argues that by not specifying the estimated number of hours in each labor category to be performed at the government site as well as the estimated number of hours to be performed off-site, the Navy has created a situation in which an offeror can manipulate the level of effort so as to lower its offer for the purposes of evaluation while charging higher rates during performance.

The Navy points out in response that offerors cannot manipulate their offers in the way the protester suggests because the solicitation requests only 1 hourly rate per labor category, and offerors will be reimbursed at that rate regardless of whether work is performed at the government site or off-site. Further, the agency states the nature of the services to be performed dictates that all of the technical labor hours will be expended on-site while only labor hours pertaining to certain secretarial and administrative personnel will be expended off-site.

Syscon responds that manipulation of the level of effort is possible even though the solicitation requests only one rate per labor category since offerors are also required to submit a cost breakdown of their hourly rates. The protester argues that the cost breakdown will serve to notify the contracting officer of the percentage of the total hours for each labor category that the offeror proposes to perform at the government site and the percentage that it proposes to perform off-site. According to the protester, by accepting the offer, the agency is bound by the offeror's mix of government site/off-site hours for each labor category set forth in the cost breakdown.

Syscon cites no support for its argument that the agency, by accepting an offer, is bound by any assumptions made by the offeror in calculating its labor rates, and we are aware of none. By accepting an offer under this RFP, the govern-

ment agrees to pay the offeror at the fixed-hourly rates set forth in its offer, and not at any differing rates that may be set forth in its cost breakdown. Beyond this point, the protester has not made clear its position that the RFP format lends itself to manipulation as to the offand on-site work. We are aware that the 97 percent to 3 percent work mix stated in the solicitation is an estimate and that this ratio may vary under the actual work orders; nevertheless, we simply do not understand the basis of Syscon's argument that under the RFP's single rate schedule this scheme will be especially susceptible to unbalanced offers.

The protester points out finally that in other solicitations for time and materials type contracts, the Navy has on occasion indicated that it will reimburse the successful offeror for relocation expenses and broken down by labor category the number of hours to be performed at the government site and off-site. Syscon argues that because the Navy has included such provision in other solicitations, it should include them here.

We do not think the fact that the agency saw fit to include these provisions in other solicitations has any bearing on whether or not their inclusion is required here. It is up to the agency to determine with regard to each procurement the contract format that will best meet its needs, *see Emerson-Sack-Warner Corp.*, B-206123, Nov. 30, 1982, 82-2 CPD ¶ 488, and the fact that it perceived a need for a particular format in another instance involving different circumstances does not mean that such a format is required here. The agency explains, for example, that it permitted reimbursement for relocation expenses in the other time and materials contract cited by the protester because the agency believed that it was needed to foster competition because there were an inadequate number of local firms with the requisite expertise.

The protest is denied.

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## **B-232646.4, B-232646.5, March 8, 1989**

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### **Procurement**

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#### **Bid Protests**

- Award pending appeals
  - ■ Multiple/aggregate awards
  - ■ ■ Propriety
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### **Procurement**

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#### **Competitive Negotiation**

- Contract awards
  - ■ Award pending appeals
  - ■ ■ Multiple/aggregate awards
  - ■ ■ ■ Propriety
- 

Where the solicitation contemplates multiple contracts for services required at many different locations throughout the country, and a protest has been filed against proposed awards at some but not

all of those locations, the stay provision of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(1) (Supp. IV 1986), requires the contracting agency to refrain from making awards only on those proposed contracts that are the subject of the protest.

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## Procurement

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### Bid Protests

■ Award pending appeals

■ ■ Multiple/aggregate awards

■ ■ ■ Propriety

Contention that recommendation in decision sustaining protest which challenged several but not all contract awards under solicitation providing for multiple awards was too narrow and should extend to all awards under the solicitation, whether or not the subject of a protest, is without merit where party challenging recommendation chose not to protest other awards and, as a result, those awards were not the subject of the decision sustaining the protest.

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### Matter of: Culver Emergency Services, Inc.—Request for Reconsideration

Culver Emergency Services, Inc., requests reconsideration of our December 19, 1988, dismissal of its protest under request for proposals (RFP) No. F41689-88-R-A122, issued by the Air Force for general dental services to be provided at various locations throughout the United States. Culver also requests reconsideration of the corrective action recommended in our decision, *Med-National, Inc.*, 68 Comp. Gen. 172 (1989), 89-1 CPD ¶ 32, sustaining a protest filed by another offeror in connection with the same Air Force procurement for dental services. We affirm the dismissal of Culver's protest and see no basis to disturb the recommendation in our decision sustaining Med-National's protest.

The RFP sought 1 to 3 full-time equivalent dentists at 69 Air Force bases and contemplated award of separate contracts at each location. Each contract would be for a basic period of 1 year with options for 4 additional years. Med-National, Inc., a competitor under the RFP, protested on September 19, 1988, on the basis that the Air Force had improperly interpreted the RFP's provisions regarding credentials of the dentists that were to be employed by a contractor and, as a result, Med-National would be deprived of contracts to which it was otherwise entitled at nine Air Force bases. Basically, Med-National wanted to substitute new, qualified dentists for those originally listed in its proposal at the nine locations; however, the Air Force believed that such substitution was not allowed under the terms of the RFP, and rejected Med-National's proposal on this ground for those nine contracts. We sustained Med-National's protest, finding that the RFP did not prohibit substituting one qualified dentist for another as Med-National proposed. Accordingly, we recommended in our decision that the Air Force award Med-National contracts for the nine Air Force bases that were the subject of Med-National's protest. See *Med-National, Inc.*, B-232646, *supra*.

Culver participated as an interested party in Med-National's protest. In addition, on November 8, 1988, Culver filed protest of its own in connection with this procurement. Culver protested that the contracting officer improperly had

awarded contracts at two performance sites to firms other than Culver, when in fact Culver was entitled to award at both sites under the RFP's stated evaluation criteria. This ground of protest was unrelated to the substitution of dentists issue raised in Med-National's protest. Despite the fact that Culver did not raise the substitution issue in its protest, Culver nevertheless challenged the Air Force's decision not to stay the award of contracts at other sites that were not the subject of Med-National's protest. Culver argued that the stay provision of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(c)(1) (Supp. IV 1986), prohibited the Air Force from awarding contracts at all sites covered by the protested RFP, including sites that were not the subject of Med-National's protest.

In response to Culver's protest, the Air Force agreed that contracts at the two sites that were the subject of Culver's protest should have been awarded to Culver and reported that it would take appropriate action to ensure that Culver received the awards to which it was entitled. As Culver would be awarded the two contracts, we dismissed the protest as academic.

Culver argues that we should not have dismissed its protest. Culver contends that its original protest was filed on two distinct bases, only one of which was rendered academic by the Air Force's actions. The first ground for protest was that Culver was entitled to awards at two Air Force bases; it concedes that this basis for protest was rendered academic by the Air Force's statement that it would take appropriate corrective action. However, Culver argues that the second basis for protest—that the Air Force was required to refrain from awarding all contracts under this solicitation after the Air Force was notified that Med-National had filed a protest—was not rendered academic by the Air Force's corrective actions. Culver asserts that its proposal, like Med-National's, was rejected by the contracting officer at 20 bases, because Culver attempted to substitute qualified dentists for the dentists it had listed in its initial proposal, just as Med-National had done. Culver contends that, if the Air Force had refrained from awarding all contracts under the RFP rather than only the contracts that were protested by Med-National, then, in view of our holding in *Med-National, Inc.*, B-232646, *supra*, Culver would have been in line for and received awards for the 20 Air Force bases where it had attempted to substitute new dentists for those originally proposed.

Culver contends that its protest that the Air Force should have withheld awards at all 69 Air Force bases after notification that Med-National had filed a protest concerning awards at 9 bases should have been sustained. We do not agree.

CICA, 31 U.S.C. § 3553(c)(1), provides that:

Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.

Contrary to Culver's argument, in our view the stay provision should not be interpreted to apply to all proposed awards under a challenged solicitation where,

as here, the agency has structured a procurement so as to award many contracts at different locations pursuant to one solicitation. Rather, under these circumstances, the only reasonable interpretation of the stay provision is that the contracting agency is required to refrain from making awards only on those proposed contracts that are the subject of a protest. Otherwise, any time a protest is filed against any part of an RFP contemplating multiple awards, the contracting agency will be prevented from making even those awards that are not the subject of a protest.

Furthermore, we do not believe that a firm such as Culver necessarily loses the protection afforded by the CICA stay provision under our interpretation of the statute. Culver was aware of and even participated in Med-National's protest; therefore, Culver could have protested in its own right on the same basis as Med-National regarding proposed contract awards at the 20 Air Force bases to which Culver believed it was otherwise entitled. Culver chose not to protest regarding substitution of dentists for those contracts, and, therefore, the Air Force was free to make award at those bases. On the other hand, Med-National protested the Air Force's rejection of its offers at nine Air Force bases because of Med-National's proposed substitution of dentists, and the Air Force was required to hold those awards in abeyance pending our decision.

Culver also contends that our recommendation in *Med-National, Inc.*, B-232646, *supra*, was not sufficient, because it "failed to account for the legitimate interests of Culver in this matter." While Culver apparently agrees with our finding that the Air Force incorrectly interpreted the RFP provisions concerning credentials and substitution of dentists, Culver believes that our recommendation that the Air Force award Med-National contracts for the nine locations that Med-National had protested and for which Med-National offered to substitute qualified dentists was too narrow. Culver asserts that we should have recommended that the Air Force reexamine the offers for every location covered by the RFP, not just those that were protested by Med-National, and where necessary terminate contracts and make awards in accord with our interpretation of the RFP. Culver states that it would then be awarded 20 additional contracts in cases where the Air Force had previously improperly rejected its offers because Culver proposed to employ substitute dentists.

Culver's argument provides no basis to modify our decision on Med-National's protest. Our recommendation was limited to the nine contracts that had been protested by Med-National. As Culver chose not to protest the other 20 proposed awards to which it believed it was entitled, those contracts were not before us for our decision. Accordingly, since a prerequisite to a recommendation of corrective action is a finding that the award at issue is improper, there was no basis to extend our recommendation to those contracts which had not been protested. See CICA, 31 U.S.C. § 3554(b)(1); 4 C.F.R. § 21.6(a) (1988). In fact, however, in a cover letter to the Secretary of the Air Force that accompanied our decision, we did recommend that the Air Force examine the proposals received for contracts other than those protested by Med-National to determine whether any of those contracts might have been awarded in a manner that was inconsistent

with our decision, and we also recommended that, if that was the case, the Air Force should take appropriate corrective action on those contracts.

As Culver has shown no errors of fact or law in our dismissal of its protest or in the corrective action recommended in our decision on Med-National's protest, we affirm the dismissal and see no basis to disturb the recommendation in the Med-National decision.

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**B-231082, March 10, 1989**

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**Civilian Personnel**

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**Travel**

- Rental vehicles
- ■ Property damages
- ■ ■ Claims
- ■ ■ ■ Payments

An Army employee who was authorized to rent a commercial vehicle while on temporary duty and who damaged the vehicle while returning it from the meeting place to his place of lodging at 2 a.m. was on official business and is entitled to be reimbursed for the payment of damages.

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**Matter of: Raymond B. Washburn—Reimbursement for Repair of Damage to Rental Vehicle**

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The question presented is whether an employee who was authorized to rent a commercial vehicle while on temporary duty and who damaged the vehicle in a collision while returning it from the meeting place to his place of lodging at 2 a.m. was on official business at the time of the collision. We find that the employee was on official business, and the damages are therefore payable by the government.

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**Background**

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Mr. Raymond Washburn is an employee of the Army Missile Command at Redstone Arsenal, Huntsville, Alabama, and the amount claimed by him (\$2,100) represents the amount he was required to pay for repairs to a vehicle which he rented while on a temporary duty assignment. Mr. Washburn was issued travel orders for the purpose of attending a HAWK Missile Facility Managers Conference in Orlando, Florida, during the period April 7-11, 1986. His orders authorized commercial car rental while in the temporary duty area.

Mr. Washburn rented an automobile from Budget Rent-A-Car upon arrival in Orlando for his use during the temporary duty period. Commercial vehicle rental contracts often provide coverage for collision damage to a rented vehicle only above a deductible amount specified in the rental contract, the customer being responsible for the cost of damage below that amount. In such instances, additional insurance (collision damage waiver or collision damage insurance) to

relieve the customer from liability for damage to the vehicle up to a deductible amount is available in the rental contract for an extra fee. Mr. Washburn properly did not obtain the extra insurance necessary to provide full collision coverage, however, since pursuant to the Federal Travel Regulations (FTR)<sup>1</sup> agencies are authorized to pay for damage to a rental vehicle up to the deductible amount contained in the rental contract if the damage occurs while the vehicle is being used for official business.

Although the meetings ended on April 10, 1986, Mr. Washburn was not scheduled for return air travel until April 11, 1986. He states that the meetings lasted into the early evening of the 10th. Afterwards, he joined some people who had attended the meetings for dinner, leaving his rental car parked at the Marriott Hotel where the meetings had been held. After dinner he was dropped off at his place of lodging, the Hilton Inn. He then remembered that his rental car was still parked at the Marriott, three blocks from the Hilton. Since he and other government employees who had attended the meetings were leaving the Hilton for the airport the following morning in the rental car, he decided to walk to the Marriott and drive the car back to the Hilton parking lot.

While driving from the Marriott parking lot in the rain, Mr. Washburn attempted to turn on the windshield wipers and, while looking at the instrument panel, struck the rear of a parked van, substantially damaging the front passenger side of the rental car. The collision occurred at approximately 2 a.m. on April 11, 1986.

Under the terms of the rental contract, liability for the deductible amount of damage to the rental car is established, regardless of the driver's negligence. Budget Rent-A-Car determined that damage to the car was in the amount of \$2,100, which Mr. Washburn paid. He now seeks reimbursement for that amount. Mr. Washburn's claim for reimbursement was denied by the Army on the basis that because the accident occurred at 2 a.m., Mr. Washburn could not have been on "official business" at the time of the accident. The Army cites Joint Travel Regulations (JTR), vol. 2, para. C1058 (Jan. 1, 1988),<sup>2</sup> as support for the denial in that Mr. Washburn's return from dinner to his place of lodging at approximately 2 a.m. constituted an "unreasonable delay," and the damage to the rental car during this unreasonable delay is not an expense payable by the government since it did not occur during the transaction of official business.

Mr. Washburn contends that the collision occurred while the rental car was being driven from the meeting place to his place of lodging and that the return of the car was official business. He further asserts that the regulations do not dictate when an employee must eat meals to qualify as "official business" and that a late evening meal does not constitute an unreasonable delay.

The Army Missile Command forwarded the claim to this Office at the employee's request.

<sup>1</sup> Para. 1-3.2c (FPMR 101-7, Supp. 1, Sept. 28, 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1987).

<sup>2</sup> Volume 2 of the JTR implements the FTR for civilian employees of the Department of Defense. The parallel provision in the FTR is para. 1-1.3a (FPMR 101-7, Supp. 1, Sept. 28, 1981).

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## Opinion

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The FTR, para. 1-1.3b provides that travel expenses will be reimbursed only for "those expenses *essential to the transacting of official business.*" (Italic added.) There is specific authority in the regulations to reimburse employees for payments made for damage to rental cars, provided the car was "damaged in the performance of official business."<sup>3</sup> The collision occurred while Mr. Washburn was driving the rental car from the meeting place to his place of lodging after having his evening meal. It was essential to the transaction of official business that the rental vehicle be returned to Mr. Washburn's place of lodging in order that he and the other government employees staying at the Hilton would be able to depart for the airport later on the morning of April 11, 1986, as expeditiously as possible.

The Joint Travel Regulations provide that when an employee of the Department of Defense rents a vehicle while on temporary duty, he is determined to be on official business while traveling between places where his presence is required incident to official business; between such places and places of temporary lodging; and between either of the foregoing places and places required for the sustenance, comfort, or health of the employee.<sup>4</sup> For example, we allowed a claim for reimbursement when a rental car was damaged by an Army officer, authorized to drive the car while on temporary duty, who drove from his place of lodging to a drugstore in order to obtain required medication. *Captain Kenneth R. Peterson, USA*, 65 Comp. Gen. 253 (1986). Moreover, we indicated that the claim could be paid without regard to the officer's possible negligence.

In *Staff Sergeant Lawrence M. Campbell, USA*, B-220779, Apr. 30, 1986, an Army member was authorized to rent a car for his use together with other Army members for transportation while on a temporary duty assignment. Even though the vehicle was damaged at an undetermined time and the circumstances of the damage were unknown, we allowed payment because the vehicle was properly rented and "the damage occurred while the vehicle was being used for *official business.*" (Italic added.)

Although the agency cites 2 JTR para. C1058, "Exercise of Prudence in Travel," as support for its denial, we believe that Mr. Washburn acted prudently in returning the rental car to the Hilton as soon as he realized it had been left at the Marriott. Since driving a car from the meeting place to the place of lodging would reasonably be considered official business and there was no unreasonable or undue delay, the time of day at which the accident occurred is irrelevant in this case.

The damage to the rental car occurred while the vehicle was being used for official business; therefore, Mr. Washburn is entitled to be reimbursed for the payment.

Accordingly, Mr. Washburn's claim for reimbursement of \$2,100 is allowed.

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<sup>3</sup> FTR, para. 1-3.2c(1).

<sup>4</sup> 2 JTR para. C2101-2c.

**Civilian Personnel**

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**Relocation**

■ **Relocation service contracts**

■ ■ **Reimbursement**

■ ■ ■ **Direct costs**

The Bonneville Power Administration (BPA) is advised that BPA employees do not have to reimburse the agency for direct costs incurred incident to a relocation services contract when a residence sale is not completed. The authority to enter into relocation service contracts under 5 U.S.C. § 5724c (Supp. IV 1986) affords agencies a broader opportunity to provide services related to real estate transactions for transferred employees, subject to the terms of the agency's contract, and is not as restrictive as the language in 5 U.S.C. § 5724a(2)(4) (1982), which specifically refers to the sale and purchase of a residence.

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**Matter of: Gerald F. Stangel, Larry D. King—Relocation Service Contracts—Liability for Direct Costs**

This decision is in response to a request from an authorized certifying officer, Department of Energy, Bonneville Power Administration (BPA), Portland, Oregon, concerning the issue of whether or not certain employees must reimburse the agency for direct costs incurred incident to a relocation services contract when a residence sale is not completed. For the reasons that follow, we conclude that the employees do not have to reimburse the agency.

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**Background**

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The Department of Energy has entered into a relocation services contract under the provisions of 5 U.S.C. § 5724c (Supp. IV 1986), with the Howard Relocation Group (Howard) in order to assist employees in selling their residences at their old duty station when they receive a permanent change of station. Certain direct costs are incurred under the terms of the contract such as appraisals, title work, and inspections, and are billed by Howard directly to BPA where they are paid by its voucher section. The BPA is concerned about this practice since its voucher section pays these direct costs without any knowledge of the employee's relocation entitlements. It is only after payment that the travel section examines the employee's travel records and determines the employee's authorized reimbursement.

The BPA has provided us with specific examples concerning reimbursement for two employees, Gerald F. Stangel and Larry D. King. Both employees incurred direct costs similar to those previously listed under Howard's relocation service contract incident to a permanent change of station. However, both employees transferred back to their old duty station and reoccupied their old residence without completing the sales transaction. Mr. Stangel transferred back to his old duty station within 3 months of his initial transfer and Mr. King transferred back to his old duty station approximately 29 months later. Mr. King's

situation is further complicated by the fact that he was separated and divorced after his transfer and prior to his return.

The agency asks if the employees must reimburse it for the direct costs paid to Howard on the theory that the transactions are analogous to an unsuccessful attempt to sell a residence, which requires reimbursement.

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## Opinion

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Under legislation enacted in 1983, federal agencies were authorized to enter into relocation service contracts in connection with the transfer of employees.<sup>1</sup> This authority includes, but is not limited to, the making of arrangements for purchase of an employee's residence at his old duty station.

The concept of a relocation service contract represents a departure from the pre-existing authority for reimbursement of real estate expenses for a federal employee. Under the authority of 5 U.S.C. § 5724a(a)(4) (1982), a transferred employee is entitled to be reimbursed for certain expenses in the sale of a residence at the old official station and purchase of a residence at the new official station. This authority is limited in its scope by the statutory language and the implementing regulations in the Federal Travel Regulations, FPMR 101-7, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985) (FTR). The authority to enter into relocation service contracts in 5 U.S.C. § 5724c, on the other hand, affords agencies a broader opportunity to provide services related to real estate transactions for its transferred employees, subject to the terms of the agency's contract.

Our Office has held that only expenses incurred incident to a completed real estate sale or purchase transaction may be reimbursed under 5 U.S.C. § 5724(a)(4) (1982). *Paul M. Foote*, B- 210566, Mar. 22, 1983; *Dennis E. Skinner*, B-202297, July 24, 1981. However, in this case, the agency is paying the relocation company directly for certain expenses incurred on behalf of the employee under its statutory authority to contract in 5 U.S.C. § 5724c, and under specific provisions of its contract. See *NSA Employees*, 66 Comp. Gen. 568, where we held that an agency may include property rental management service in its relocation service contracts, concluding that section 5724c should be given a liberal interpretation.

The relocation service contract with Howard contains several provisions which we believe are applicable here. Paragraph H.08 of the contract reserves the right of the agency to cancel an employee's authorized change of station when the cancellation is determined to be in the best interest of the government. No service charge is paid to Howard; however, direct costs incurred such as inspections, surveys, appraisals of the property, and title search fees will be allowed and paid for under the terms of the contract to Howard. Paragraph 1B(1) of the contract provides for an amended value transaction in which the same direct costs enumerated above will be allowed if the employee elects to market the res-

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<sup>1</sup> See section 118, Pub. L. 98- 151, 97 Stat. 978, Nov. 14, 1983, as amended by section 120(b), Pub. L. 98-473, 98 Stat. 1837, 1969, Oct. 12, 1984, now codified at 5 U.S.C. § 5724c (Supp. IV 1986).

idence solely on his own, including the final sale and settlement.<sup>2</sup> Further, paragraph 3 of the contract provides for home selling assistance to the employees without cost in the event that the employee elects not to use the guaranteed home purchase service or amended value transaction.

The terms of the relocation service contract, as outlined above, are a departure from the usual residence sales agreement, and the contract allows both the agency and the employee a certain latitude to cancel or elect not to use the relocation services that are offered. The agency remains obligated to reimburse the relocation company for its direct costs. Further, since the role of Howard in this case is that of a buyer, the direct costs due under the contract, e.g. appraisals, surveys, and inspections, are the type of expenses that would not normally be incurred by an employee/seller.

Therefore, we believe that under these circumstances the agency has the obligation to pay the direct costs to Howard under the terms of the contract. We are aware of no statutory or regulatory requirement that the agency seek reimbursement from the employee, so long as the transfer is in the interest of the government and is not primarily for the benefit of the employee.

Turning to the facts of this case, we note that Mr. Stangel was transferred in the interest of the government in June, he transferred back to his old duty station in September, and the real estate expenses were incurred within this period. The expenses, in the amount of \$1,230, were for direct costs as authorized by the terms of the relocation service contract, and Mr. Stangel's retransfer was in the nature of a cancelled change of station and therefore payable by the agency under paragraph H.08 of the contract. Accordingly, Mr. Stangel does not have to reimburse the government.

We also conclude that Mr. King does not have to reimburse the government for the real estate expenses incurred on his behalf even though he was divorced from his wife at the time of his retransfer to his old duty station. The GSA guidelines in Supp. 11 of the FTR, para. 2-12.5d, provide that agencies should not make payments to relocation companies that will benefit ineligible individuals. However, Mr. King held title jointly with his spouse who was a member of his family at the time he reported to his new permanent duty station in June 1985, as provided for in FTR, para. 2-1.4d (Supp. 4, Oct. 1, 1982). *William J. Fitzgerald*, 66 Comp. Gen. 95 (1986); *Alan Wood*, 64 Comp. Gen. 299 (1985).

Mr. King was authorized to use the relocation service contractor in September 1986, and his expenses, in the amount of \$1,297.90, were incurred before the date of his legal separation from his wife in April 1987. We recognize that Mr. King's declination of Howard's offer to purchase his residence may have been related to his pending divorce; however, paragraph 1B of the contract allows the employee to decline the contractor's offer without any limitations on the reasons for doing so, and any direct costs incurred will be allowable.

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<sup>2</sup> Under an amended value transaction, if the employee is successful in finding a buyer whose bona fide offer will net the employee more than the contractor's offer, the contractor is given an opportunity to amend its offer.

Accordingly, we conclude that Mr. Stangel and Mr. King do not have to reimburse the government for the direct costs incurred on their behalf incident to the DOE contract with Howard Relocation Group.

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**B-230343, March 13, 1989**

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**Civilian Personnel**

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**Leaves Of Absences**

■ Annual leave

■ ■ Charging

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**Civilian Personnel**

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**Relocation**

■ Household goods

■ ■ Shipment

■ ■ ■ Reimbursement

■ ■ ■ ■ Eligibility

A transferred employee who was offered government housing for 1 year as an accommodation in a high-cost resort area may not be paid the expenses incurred in later moving his household goods locally to a private residence. Such moving expenses may be paid by the agency only where the employee is required to occupy government quarters. Furthermore, the employee may not have restored the 16 hours of annual leave used during the move.

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**Matter of: Gordon E. Warrington—Local Moving Expenses From Government Housing**

This decision is in response to a request by the Forest Service for a decision concerning an employee's claim for reimbursement of local moving expenses and restoration of 16 hours of annual leave used by the employee in moving from government housing to a private residence.<sup>1</sup> For the reasons stated later in this decision, we conclude that the agency need not reimburse the employee for local moving expenses where the move into government quarters was not required by the agency. Similarly, the 16 hours of annual leave used by the employee while moving may not be restored.

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**Background**

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Mr. Gordon E. Warrington, an employee of the Forest Service, was transferred to the Bridger-Teton National Forest, Jackson, Wyoming, where there are a limited number of government housing units available. The Forest Service reports that these units are used to provide temporary housing, for approximately 1 year, to new employees moving into the area to allow them sufficient time to locate a permanent residence. The agency states that Jackson is a resort town,

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<sup>1</sup> The request was submitted by Mr. James Turner, Authorized Certifying Officer, Forest Service, United States Department of Agriculture.

that housing prices are higher than average, and that the availability of housing is reduced during certain periods of the year.

Mr. Warrington moved into government housing on or about August 29, 1985, and was asked to vacate the residence by December 8, 1986. He seeks reimbursement for the moving and transportation expenses he incurred in moving from the government quarters to his private residence (\$559.33) along with the restoration of 16 hours of annual leave he used while moving.

The Forest Service considers Mr. Warrington's movement into the government housing as a move into permanent quarters which bars the payment of additional moving expenses. The agency states that it is aware of our decisions which permit the payment for local transportation of household goods as administrative expenses in limited situations. However, in each of the decisions, the employee was *required* to occupy the government housing as a condition of employment. The Forest Service says that the occupancy in this case was optional on the part of Mr. Warrington.

Mr. Warrington argues that the agency should pay his moving expenses from the government housing to a private residence. He contends he was required to move into available Forest Service housing and the agency then required him to move out of the government quarters. He also contends that since he acted at the request of the Forest Service and had no personal choice in these moves, he should be reimbursed for the expenses he incurred in moving from government quarters to a private residence.

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## Opinion

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When Mr. Warrington vacated these government quarters, it was not incident to a transfer to a new duty station. Therefore, the relocation of his residence and the transportation of his household goods from government quarters to a private residence may not be regarded as a permanent change of official station within the purview of 5 U.S.C. §§ 5724 and 5724a (1982), and the implementing Federal Travel Regulations for purposes of reimbursing him for the expenses incurred in moving his household effects locally.

On the other hand, our Office has held that an employee may be reimbursed the expenses of moving household goods into or out of government quarters locally when directed by the official responsible for administration of an installation, not as an authorized change of duty station but as an administrative cost of operating the installation. Such expenses are normally incurred when the agency requires the employee to occupy government quarters. *See* B-172276, July 13, 1971; B-138678, Apr. 22, 1959.

In this case, the agency has concluded that these government quarters were made available to Mr. Warrington as an accommodation to him and that he was not required to move into government quarters. In addition, it appears that Mr. Warrington knew that these government quarters would only be available to him for approximately 1 year. Thus, when Mr. Warrington was ordered to

vacate these quarters, such action was neither unanticipated nor was it an involuntary move from quarters he was required to occupy. Therefore, the decisions cited above do not apply to Mr. Warrington's situation.

Accordingly, we conclude that the costs incurred by Mr. Warrington in moving his household goods from government housing to a private residence may not be paid as an administrative expense by the agency. Consequently, we find no basis to allow the restoration of the 16 hours of annual leave to his leave account.

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**B-230423, March 13, 1989**

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**Civilian Personnel**

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**Compensation**

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

An employee was erroneously retained on the payroll by his agency for 2 days beyond his retirement resulting in an overpayment for final pay and leave. Waiver of the overpayment is denied, notwithstanding the employee's lack of fault, since the agency promptly notified the employee of the error and requested repayment. In these circumstances it is not against equity and good conscience, as provided by the waiver statute, to require repayment.

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**Civilian Personnel**

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**Compensation**

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

An employee asserted that because of changes in tax laws, his tax liability was increased due to his agency's error in overpaying him in 1986 for which he made refund in 1987, and that should be a basis for waiving the overpayment. The application of the tax laws to individual cases is a matter for the revenue authorities and is not a basis for waiving an erroneous payment of pay pursuant to 5 U.S.C. § 5584.

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**Matter of: Richard C. Clough—Overpayment of Final Pay and Leave Upon Retirement—Waiver**

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Mr. Richard C. Clough, a former employee of the Federal Aviation Administration (FAA), appeals our Claims Group's denial of his request for waiver of erroneous payments he received during December 1986 following his retirement. The overpayments were for 16 hours of regular pay and 8 hours of pay for annual leave Mr. Clough received due to the agency's error in retaining him in a pay status following his retirement. We sustain the denial of waiver, as explained below.

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## Background

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Mr. Clough retired from his position as a staff accountant, GS-14, in the FAA's Office of Accounting on December 3, 1986. Because of an administrative error, the agency failed to transfer Mr. Clough to a nonpay status until after the bi-weekly pay period ending December 6, and, as a result, erroneously compensated him for 16 hours (December 4 and 5). In addition to being retained in a pay status for that entire pay period, he was erroneously credited with 8 hours of additional annual leave for the following pay period, payment for which was included in his lump-sum leave payment. These payments were made directly into Mr. Clough's bank account in the latter part of December 1986.

On December 19, his former supervisor informed Mr. Clough by telephone of the errors and the resultant overpayments. At that time, Mr. Clough stated that he was unaware of the overpayments since he had not seen his Time and Attendance Report or Earnings and Leave Statement for the previous pay period. In addition, he indicated that since his paychecks were deposited directly into his bank account through electronic fund transfers and he had not yet received his monthly bank statement, he was not then aware of the extra amounts deposited. On January 23, the agency billed Mr. Clough for repayment in the amount of \$474.61, which represented the gross overpayment less amounts collected for tax and retirement withholdings. Mr. Clough remitted the net overpayment of \$474.61 to the agency on January 27, 1987.<sup>1</sup>

By letter dated February 13, 1987, Mr. Clough requested a waiver and refund under 5 U.S.C. § 5584 of the overpayments on the grounds that they resulted solely through the agency's negligence and were not attributable to any wrongdoing on his part. In addition, he complained that the agency's overpayment in 1986, which he was required to repay in 1987 unfairly increased his tax liability. This apparently was due to the reduction in tax rates in 1987 and the placing of a threshold amount on the miscellaneous deductions allowed for that year. The record shows, however, that the agency queried the Internal Revenue Service concerning Mr. Clough's situation and apparently followed the Service's directions in the issuance of Mr. Clough's reports of wages and earnings statements (forms W-2).

The agency denied Mr. Clough's request for waiver because it determined that collection would not be against equity and good conscience since the agency's prompt notification of the error precluded him from relying on the accuracy of the payments to his detriment. Our Claims Group sustained the agency's denial of waiver.

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<sup>1</sup> Subsequently due to several adjustments, the agency found that it had overcollected and that Mr. Clough was due a refund of \$2.91, which we assume has been repaid to him.

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## Discussion

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The Comptroller General is authorized by 5 U.S.C. § 5584 to waive claims arising out of erroneous payments of pay and allowances if there is no "indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee" and collection would be "against equity and good conscience and not in the best interests of the United States."

In this case the overpayments occurred due to agency error and there appears to be no indication of fraud, misrepresentation, fault, or lack of good faith on Mr. Clough's part. These circumstances alone, however, do not entitle Mr. Clough to waiver.

As the statutory language indicates, whether to grant waiver under 5 U.S.C. § 5584 is not to be decided simply as a matter of right whenever an employee innocently receives compensation to which he is not entitled, but is to be decided on principles of equity and fairness under the circumstances present in each case. Accordingly, we have held that where an agency's prompt notification of an overpayment to an employee precludes him from relying on the accuracy of the payment to his detriment, waiver is inappropriate since collection of the payment would not be against equity and good conscience despite the absence of fault on the part of the employee. See *Harold G. Wells*, B-188492, Feb. 16, 1978; and *Seymour Zirin*, B-204974, June 24, 1982. In this case the agency promptly notified Mr. Clough by telephone of the error and provided him with a written explanation the following month.

As to Mr. Clough's assertion that his tax situation also should be considered as a factor supporting waiver of his debt, the application of the tax laws to an individual's income is a matter for consideration by the revenue authorities and generally is not within our jurisdiction. Also, the tax consequences of collection of erroneous payments are not matters specifically addressed by the waiver statutes. Therefore, considering the many possible tax liability variables which may apply in individual cases, it is our view that this is not a matter upon which to base a decision to waive a debt which otherwise does not meet the requirements for waiver.

Accordingly, for the reasons explained above, we decline to grant waiver in Mr. Clough's case.

**Civilian Personnel**

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**Compensation**

- Additional compensation
- ■ Determination
- ■ ■ Apartment rental

A transferred federal employee rented a furnished condominium apartment at his new post of duty from another employee for use as temporary quarters while his new permanent residence was under construction. The lessor's rental of his property is unrelated to his official duties and does not result in additional pay or allowances under 5 U.S.C. § 5536. 7 Comp. Gen. 348 (1927) overruled.

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**Civilian Personnel**

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**Relocation**

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

A transferred federal employee rented a furnished condominium apartment at his new post of duty from another employee for use as temporary quarters while his new permanent residence was under construction. Reimbursement is permissible for noncommercial lodgings if the charges are reasonable and result from expenses incurred by the other party. Hence, in this case the transferred employee may be allowed full reimbursement of the rent he paid based on information showing that the rent was less than the cost of commercial lodgings and was reasonably related to the actual expenses incurred by the other employee in the arrangement.

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**Matter of: Peter Lalic—Temporary Quarters Subsistence Expenses—  
Rental from Co-Employee**

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This is in response to a request for an advance decision from the Internal Revenue Service (IRS), regarding the claim of Mr. Peter Lalic for additional temporary quarters subsistence expenses.<sup>1</sup> We conclude that his claim should be allowed.

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**Background**

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Mr. Lalic, an IRS employee, was transferred from Washington, D.C., to Detroit, Michigan, effective September 15, 1986. He and his family moved to Detroit at the same time another IRS employee, Mr. David Palmer, was assigned away from Detroit to participate in an IRS executive management program. Mr. Palmer was scheduled to be away from Detroit for at least 6 months starting the second week in September.

Mr. Lalic was authorized 120 days of temporary quarters subsistence expenses while his new permanent residence in Michigan was under construction. Mr. Palmer's home, a furnished condominium apartment, was located near the

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<sup>1</sup> The request was made by G. Fannin, Authorized Certifying Officer, IRS Central Region, Cincinnati, Ohio.

place where Mr. Lalic's permanent home was being constructed. An agreement was reached under which Mr. Lalic rented Mr. Palmer's apartment from September 14, 1986, to January 10, 1987. At the end of that period, Mr. Palmer reportedly rented his apartment to another party, but the circumstances and terms of that rental agreement are not described.

Although no written lease was entered into, Mr. Lalic paid a monthly rental fee to Mr. Palmer for the exclusive use of his apartment. The fee was based on the following amounts:

Monthly mortgage payment (principal, interest and taxes) .....	\$560.00
Monthly condominium association fee .....	\$100.00
Estimated utilities (gas, electric, telephone, cable television, and soft water) .....	\$290.00
Insurance .....	\$25.00
Rental of furniture and furnishings.....	\$125.00
Total .....	\$1,100.00

Mr. Lalic submitted a claim for temporary quarters subsistence expenses which was denied in part by the IRS. The IRS allowed payment for his food and laundry expenses, but disallowed reimbursement of his lodging expenses. The IRS based its denial on Comptroller General decisions limiting the scope of reimbursement for temporary quarters subsistence expenses in situations involving the use of noncommercial lodgings, and the rental of lodgings by one government employee to another. Mr. Lalic submitted a second claim for reimbursement of his lodging expenses, and the IRS then referred the matter here with a request for our decision on the propriety of paying those expenses.

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## Opinion

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### Rental Agreements Between Federal Employees

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In 7 Comp. Gen. 348 (1927) we stated that reimbursement to the wife of an employee of rent paid at a commercial or business rate to the benefit of another government employee was prohibited by section 1765, Revised Statutes. This statute, as codified, today appears in substantially the same form in 5 U.S.C. § 5536 (1982) as follows:

An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance.

We have not followed 7 Comp. Gen. 348 in subsequent decisions. Instead, without referring to that case, we have allowed reimbursement of fees paid by one employee to another for the rental of quarters. Thus, in *Jerome R. Serie*, 65 Comp. Gen. 287 (1986), we held that the rental of temporary quarters by one

employee to another may be allowed to the extent that the charge is reasonably related to the actual expenses incurred by the employee furnishing the quarters. In other cases, we have held that 5 U.S.C. § 5536 does not apply to other transactions which are not related to the employee's service or duty. 22 Comp. Gen. 943 (1943); B-37736, B-40718, May 29, 1944.

As suggested by the decisions above which postdate 7 Comp. Gen. 348, we are now of the view that an employee's rental of property to another employee is an independent matter unrelated to the employee's official duties which should not be regarded as resulting in "additional pay or allowance . . . for any other service or duty . . ." within the meaning of 5 U.S.C. § 5536. Accordingly, we hereby expressly overrule 7 Comp. Gen. 348 (1927).

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### Rental of Non-Commercial Lodgings

Under 5 U.S.C. § 5724a(a)(3) (Supp. I 1983), transferred government employees may be paid subsistence expenses incurred while occupying temporary quarters at their new post of duty for periods of up to 120 days. Temporary quarters may be either commercial or non-commercial in nature, and in both cases payment is limited to actual expenses, reasonable in amount. Federal Travel Regulations, para. 2-5.2c and 2-5.4a, *incorp. by ref.*, 41 C.F.R. § 101-7.003.

When deciding what amounts are reasonable under these provisions of statute and regulation, we have made a distinction between commercial and non-commercial temporary quarters. As we said in *Jerome R. Serie*, 65 Comp. Gen. 287, 289 (1986):

Regardless of the character of the relationship between the employee and his host we have consistently held that claims involving noncommercial lodgings should be supported by information indicating that the lodging charges are the result of expenses incurred by the party providing the lodging. 55 Comp. Gen. 856 and *Constance A. Hackathorn*, B-205579, June 21, 1982.

In the present case, since Mr. Palmer normally used the condominium apartment as his own residence and did not routinely or customarily offer it for rent to members of the general public, reimbursement of the rental fee paid by Mr. Lalic may be allowed only to the extent that it was reasonably related to the actual expenses incurred by Mr. Palmer.

Mr. Lalic has presented documentary information showing that the rental fees he paid to Mr. Palmer were substantially less than the costs of comparable commercial lodgings in the same area. Furthermore, it appears that the rent charged by Mr. Palmer was based primarily on the actual expenses incurred by him in paying the mortgage costs, condominium fees, and insurance and utility charges associated with the maintenance of the residence. Also, the additional monthly furniture rental fee of \$125 appears to us to have been a reasonable amount to defray Mr. Palmer's necessary expenses associated with anticipated normal wear and tear on his household furnishings during the rental period.

We note further that Mr. Lalic and Mr. Palmer did not occupy the residence jointly, but rather that the Lalic family had exclusive occupancy. Consequently, unlike cases involving joint residency, in this case there is no apparent need to

determine what "additional" expenses, if any, are attributable to the Lalic family's use of the residence. *Compare, Jerome R. Serie, supra*, 65 Comp. Gen. at 289, and *Clarence R. Foltz, supra*, 55 Comp. Gen. at 857-858. Instead, it is our view that in this case it has been shown that all of the rental fees paid by Mr. Lalic were reasonably related to the actual expenses incurred by Mr. Palmer in providing the residence for the exclusive use of the Lalic family.

Accordingly, we allow Mr. Lalic's claim in full.

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**B-232234.2, March 16, 1989**

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**Military Personnel**

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**Pay**

**■ Retired personnel**

**■ ■ Post-employment restrictions**

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**Procurement**

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**Competitive Negotiation**

**■ Competitive advantage**

**■ ■ Conflicts of interest**

**■ ■ ■ Post-employment restrictions**

**■ ■ ■ ■ Allegation substantiation**

Statutes barring retired military officer from representing other parties before military department within 2 years of retirement and permanently barring officer from representing parties before government concerning matters in which officer was personally and substantially involved are, either by explicit statutory language or agency regulation, not applicable to retired enlisted military personnel.

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**Matter of: Emerson Electric Co.**

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Emerson Electric Co. protests the Air Force's award of a contract to Exide Electronics, Inc., under request for proposals (RFP) No. F04606-87-R-0313 for uninterruptable power systems (UPS). Emerson contends that Mr. Edmund Jones, a retired Air Force Chief Master Sergeant and currently Exide's Manager of Federal Systems, violated 18 U.S.C. § 207(a) (1982) and 18 U.S.C.A. § 281 (West Supp. 1988), governing retirees' representational activities, by signing Exide's proposal and award documents.

We deny the protest.

On May 5, 1987, the agency issued the RFP to meet the agency's requirements for UPS, which protect electronic equipment from power anomalies both by controlling the flow of current from commercial utilities and by providing power in the event that service is interrupted. The competition was essentially based on price alone, with award to be made to the lowest technically acceptable offeror.

On June 26, the agency held a preproposal conference for potential offerors; Mr. Jones, who had retired from the Air Force as a Chief Master Sergeant on No-

vember 30, 1985, and who was then serving as Exide's Manager of Federal Systems, attended the conference as a representative of Exide.<sup>1</sup> On February 18, 1988, the agency received two technically acceptable initial proposals, from the awardee, and from the protester. On April 4, the agency issued amendment No. 0008 requesting that best and final offers (BAFOs) be submitted by April 8; both offerors responded in a timely manner. Mr. Jones, who had signed Exide's initial proposal and who had served as Exide's point of contact for negotiations, also signed Exide's BAFO.

On May 6, 1988, since Exide's evaluated price was substantially lower than the protester's evaluated price the agency awarded a contract to Exide. Having learned of Mr. Jones's retirement date and discovering that his activities on behalf of Exide had occurred within a 2-year period since Mr. Jones's retirement, Emerson filed this protest on November 29 against the Air Force's refusal either to reject Exide's offer or to terminate the contract.<sup>2</sup>

Emerson alleges that Mr. Jones's representational activities, such as signing the Exide offer, violate 18 U.S.C.A. § 281, which provides in pertinent part that:

(a)(1) A retired officer of the Armed Forces who . . . within two years after release from active duty . . . receives . . . any compensation for representation of any person in the sale of anything to the United States through the military department in which the officer is retired . . . shall be fined under this title or imprisoned not more than two years, or both.<sup>3</sup>

Emerson also contends that Mr. Jones's actions violate 18 U.S.C. § 207(a) which prohibits former government employees from representing parties before the government on matters in which such employees participated personally and substantially in the course of their employment.

With regard to 18 U.S.C.A. § 281, we have previously held that apart from Mr. Jones's other activities on behalf of Exide, signing a bid can constitute "representation" under 18 U.S.C.A. § 281, and, where agency regulations so provide, the agency may reject a bid submitted by a retired officer. *See Sterling Supply Corp.*, B-224298, Jan. 6, 1987, 87-1 CPD ¶ 10; *Sterling Supply Corp.—Request for Reconsideration*, B-224298.2, Apr. 6, 1987, 87-1 CPD ¶ 381.

Here, the major military departments have issued extensive regulations implementing 18 U.S.C.A. § 281 and other conflict of interest statutes. Of particular significance, the Air Force regulations, applicable here, implement 18 U.S.C.A. § 281 by proscribing certain representational activities by retired regular (commissioned) officers. *See* Air Force Regulation 30-30, para. 21 (1983). These regulations do not proscribe representational conduct by retired enlisted personnel. We also note that Army and Navy regulations similarly fail to apply this prohibition to retired enlisted personnel. *See* 32 C.F.R. §§ 583.1(d)(ii), 721.15(c)(1)(ii)(A) (1987).

<sup>1</sup> Mr. Jones is a retired enlisted man and was never a commissioned officer during his military service.

<sup>2</sup> This is Emerson's second protest. We previously denied Emerson's protest alleging that Exide's offer was "nonresponsive" under the solicitation. *Emerson Electric Co.*, B-232234, Dec. 2, 1988, 88-2 CPD ¶ 552.

<sup>3</sup> Previously, this language essentially was included as an 18 U.S.C. § 281 note (1982) and the prohibition against representation by a retired military officer was applicable at all relevant times in this case.

In *Sterling Supply Corp.*, B-224298, *supra*, and in other decisions of our Office, we have accepted the basic principle of generally granting deference to the agency's interpretation of statutes which it is charged with administering. *Charles A. Martin & Assocs.*, 65 Comp. Gen. 828 (1986), 86-2 CPD ¶ 268. Here, the regulations, which we accept as controlling, restrict coverage of 18 U.S.C.A. § 281 to commissioned officers only. Further, this interpretation of the term "officer" in 18 U.S.C.A. § 281 (as referring to commissioned officers) is consistent with the generally applicable definition of "officer" which defines that term as a "commissioned or warrant officer." 10 U.S.C. § 101(14) (1982). Thus, we cannot conclude that the agency's regulations, limiting coverage to commissioned officers, is arbitrary or unreasonable. *See generally Wallace O'Conner, Inc.*, B-227834, Aug. 19, 1987, 87-2 CPD ¶ 181.<sup>4</sup> Accordingly, we find that the agency reasonably concluded that Mr. Jones did not violate 18 U.S.C. § 281.

Emerson also alleges that Mr. Jones violated 18 U.S.C. § 207(a), the permanent statutory bar against representational activities regarding matters in which individuals participated "personally and substantially" as government employees. However, 18 U.S.C. § 202(a) expressly exempts enlisted personnel from this prohibition. Since, as indicated above, Mr. Jones is an enlisted person, we find that the representational provisions of 18 U.S.C. § 207(a) are inapplicable to this situation. We note also that, consistent with this statute, Air Force Regulation 30-30, para. 20, specifically provides that 18 U.S.C. § 207(a) does not govern enlisted personnel. While Emerson argues that Congress did not intend to exempt noncommissioned officers from compliance with 18 U.S.C. §§ 201-208, we believe that the clear and unambiguous language of the statute indicates otherwise.

We deny the protest.

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**B-233724, March 16, 1989**

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**Procurement**

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**Competitive Negotiation**

■ **Contract awards**

■ ■ **Initial-offer awards**

■ ■ ■ **Discussion**

■ ■ ■ ■ **Propriety**

Contracting agency improperly made award on the basis of initial proposals, without discussions, where the record does not clearly show that the contract awarded will result in the lowest overall cost to the government.

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<sup>4</sup> We also note that Congress is apparently aware that the statute treats the representational activities of retired officers on a different basis than the representational activities of retired enlisted personnel. *See* H.R. Rep. No. 446, 100th Cong., 1st Sess. 665, *reprinted in* 1987 U.S. CODE CONG. & AD. NEWS 1355, 1777.

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**Matter of: Monarch Enterprises, Inc.**

Monarch Enterprises, Inc., protests the award of a contract to Edwin Lewis, under request for proposals (RFP) No. 20-00-9-032, issued by the Farmers Home Administration (FmHA) for interest credit renewal services. Monarch alleges that the agency improperly awarded the contract on the basis of Lewis's higher-priced proposal.

We sustain the protest.

The RFP sought proposals for a contract, with a base period of 1 year plus 1 option year, to interview and verify the income of borrowers on loans serviced by FmHA, and then to prepare the forms used by FmHA to calculate the borrower's monthly payments for the coming year. The solicitation requested offerors to include in their proposals a description of their prior experience, the names, addresses and telephone numbers of previous employers, and letters of reference from clients for which similar work had been undertaken within the past 2 years. Award was to be made to the responsible offeror whose proposal was most advantageous to the government, cost and other specified factors considered, with the following technical evaluation factors specified: qualifications/prior experience (35 points); available resources/facilities (35 points); references from clients for whom similar work had been performed (25 points); and past performance in providing interest credit renewal services to FmHA (5 points). The solicitation stated that although the agency might award to other than the low, technically acceptable offeror, price would be an important evaluation factor.

Eight proposals were received in response to the solicitation. Although Lewis offered only the third lowest price, \$69,080 (\$22 per completed application package), he received the highest technical score (79 points). The agency considered it a strength of Lewis's proposal that he had prior experience in providing interest credit renewal services to FmHA, that the proposal addressed in some detail the place where the work would be performed, and that he furnished favorable letters of recommendation, including letters from two FmHA officials attesting to the quality of the interest credit renewal services and other work he had performed for the agency.

Monarch offered the low price, \$56,520 (\$18 per package), but only received the fifth highest technical score (52 points). Although FmHA concluded that Monarch's proposal met qualifications with respect to the evaluation factors for prior experience/qualifications and available resources/facilities, the agency considered the proposal weak in these areas compared to Lewis's, and also considered it a relative weakness that the proposal only included references and not letters of recommendation, and that Monarch had not previously performed services for FmHA. The second low price (\$59,660, \$19 per package) was offered by Garland Crump, who also received the second highest technical score (61 points). FmHA apparently considered it a strength of the proposal that Crump had previously provided interest credit renewal services, but the agency considered Crump's furnishing of only one letter of recommendation and his failure to

mention the quality and promptness of his prior interest credit renewal work for the FmHA to be the relative weaknesses in his proposal.

Based upon its evaluation of the initial proposals, FmHA determined that award to Lewis would be in the best interests of the government and proceeded with an award to that firm, without conducting discussions, on November 2, 1988.

Although Monarch contends in its protest only that it should have received a higher score and that award to Lewis at a 22 percent higher price has not been adequately justified, we sustain the protest on the separate ground that FmHA improperly made award to Lewis at other than the lowest price without conducting discussions.

Under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (Supp. IV 1986), in negotiated procurements, agencies may award a contract on the basis of initial proposals, without discussions, only:

when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government.

We have held that by its express use of the term "lowest overall cost," CICA limits the contracting officer's discretion by prohibiting acceptance of an initial proposal where there is at least one other lower cost proposal in the competitive range. *United Telecontrol Electronics, Inc.*, B-230246, B-230246.2, June 21, 1988, 88-1 CPD ¶ 590. Under this standard, FmHA could not make award to other than the low offeror without first conducting negotiations and accepting revised proposals from all offerors in the competitive range.

The record indicates that while Lewis's proposal clearly was deemed technically superior to Monarch's proposal, Monarch was not determined to be technically unacceptable, and we find no evidence that Monarch nevertheless was considered unacceptable, warranting its exclusion from the competitive range. In this regard, under the two most important factors of qualifications/prior experience and resources/facilities, FmHA specifically concluded that Monarch "meets qualifications"; Monarch lost points under the references factor merely for supplying names rather than letters of reference (a potentially easily correctable omission); and the prior FmHA experience factor (under which Monarch received no points) comprised only 5 percent of the evaluation. At the same time, Monarch was the low offeror (22 percent below Lewis's price), a significant fact given that, since the RFP did not indicate otherwise, cost had the same weight in the evaluation as the technical factors combined, *Actus Corp./Michael O. Hubbard and L.S.C. Assocs.*, B-225455, Feb. 24, 1987, 87-1 CPD ¶ 209, and the additional fact that cost must be considered in determining the competitive range. Federal Acquisition Regulation § 15.609.

Of course, the mere fact that a proposal has not been rejected as technically unacceptable does not automatically lead to the conclusion that the proposal was in the competitive range; an otherwise acceptable proposal properly may be considered to be outside the competitive range for negotiation purposes where,

compared to other proposals, it clearly does not have a reasonable chance of being selected for award. *Vista Videocassette Services, Inc.*, B-230699, July 15, 1988, 88-1 CPD ¶ 55. However, the record does not show that FmHA made such a determination here, and we find no basis for such a conclusion. Monarch, if given an opportunity to submit a revised proposal, conceivably could have increased its score by 14 points under resources/facilities (by specifying its office space rather than indicating that space would be acquired), and by 15 points under references (by submitting letters of reference), raising its score above Lewis's. Given Monarch's substantially lower price, and the equal cost/technical weighting, we will not speculate that Monarch was considered not to have a reasonable chance of receiving the award.<sup>1</sup>

We thus sustain the protest on the ground that FmHA improperly made award on the basis of initial proposals, without discussions, to an offeror that did not represent the lowest overall cost to the government, even though there was at least one other lower cost offeror in the competitive range.

By letter of today to the Secretary of Agriculture, we are recommending that the competition be reopened, discussions be held with the offerors in the competitive range, and best and final offers be received. In the event that Lewis is not selected for award under this reopened competition, the contract awarded to Lewis should be terminated for the convenience of the government. In addition, we find that Monarch is entitled to recover its costs of filing and pursuing the protest, including attorneys' fees. See 4 C.F.R. § 21.6(d)(1) (1988); *Information Spectrum, Inc.*, B-233208, Feb. 22, 1989, 89-1 CPD ¶ 187. Monarch should submit its claim for costs to the agency.

The protest is sustained.

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**B-231445, March 20, 1989**

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Necessary expenses rule**

■ ■ ■ **Awards/honoraria**

The Railroad Retirement Board may elect to use either its general appropriations or the separate appropriation supporting its Office of Inspector General (OIG) to pay performance awards to members of the OIG's Senior Executive Service. When one can reasonably construe two appropriations as available for an expenditure, we will accept an administrative determination as to which appropriation to charge; once the Board has made its selection, it must continue to use that appropriation.

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<sup>1</sup> Similarly, nothing in the record indicates that Crump would not have had a reasonable chance for award had the FmHA conducted negotiations; Crump's proposed price was approximately 13 percent lower than Lewis's, and its proposal received the second highest technical score.

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## **Matter of: Payment of SES Performance Awards of the Railroad Retirement Board's Office of Inspector General**

The United States Railroad Retirement Board (Board) asks whether it may use appropriations intended for the Board's Office of Inspector General (OIG) to pay performance awards to OIG's Senior Executive Service (SES) employees, or whether it should use other appropriations made to the Board. For the reasons given below, we conclude that the Board may use either appropriation.

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### **Background**

The Railroad Retirement Board is an independent agency within the executive branch charged to administer the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v, and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-368. Section 23 of the Railroad Retirement Act, 45 U.S.C. § 231v, provided for the establishment of the Office of Inspector General within the Board subject to the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101. <sup>1</sup>

The Congress typically finances the operations of the OIG by the appropriation "Limitation of Review Activity," an appropriation separate from other appropriations made to the Board. *See, e.g.*, Pub. L. No. 100-436, 102 Stat. 1680, 1712 (the Board's fiscal year 1989 appropriation). The appropriation is for audit, investigatory and review activities. The Board pays salaries of OIG employees from this appropriation.

The Board questions whether this account is the appropriate account from which to pay performance awards to the OIG's SES employees. Under the Civil Service Reform Act, the Board determines to whom performance awards will be made and the amounts of those awards.<sup>2</sup> 5 U.S.C. § 5384. The Board suggests that as a consequence, such awards are payable not from the OIG's separate appropriation, but only from the Board's other appropriations.<sup>3</sup>

The Board is concerned, however, that use of such other appropriations, when the OIG has its own appropriation, constitutes an impermissible augmentation of the OIG appropriation. The Board asks for our help in solving its dilemma.

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<sup>1</sup> Effective April 1989, the Board's Office of Inspector General will operate under authority of section 9 of the Inspector General Act. Recently enacted amendments to that Act repealed section 23 of the Railroad Retirement Act, and amended section 9 of the Inspector General Act to establish section 9 as the authority for the Board's Office of Inspector General. Pub. L. No. 100-504, §§ 102(d), (e)(3), 102 Stat. 2515 (1988).

<sup>2</sup> The Act imposes on the agency restrictions on the aggregate amount of awards it may make in any fiscal year. 5 U.S.C. § 5384(b)(3).

<sup>3</sup> The operations of the Board, other than the OIG's activities, are generally funded by two appropriations: "Limitation on Administration" and "Limitation on Railroad Unemployment Insurance Administration Fund." *See* Pub. L. No. 100-436, 102 Stat. at 1711-12. According to a Board official, the Board pays the salaries of non-OIG staff from these appropriations; amounts are drawn from each account in proportion to the type of work performed. The Board uses these appropriations, in the same manner, to pay performance awards to its non-OIG SES staff.

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## Discussion

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Where one can reasonably construe two appropriations as available for an expenditure not specifically mentioned under either appropriation, we will accept an administrative determination as to which appropriation to charge. *See, e.g.*, 59 Comp. Gen. 518, 520 (1980). In this case, we find that there are sound reasons to support funding OIG SES performance awards from either the OIG appropriation or the other appropriations available to the Board; hence, the Board has discretion to determine which appropriation(s) it will use and we will accept its decision. Once the Board makes its choice, it must continue using the same appropriation(s) to the exclusion of any other, unless, of course, and until the Congress, by law, dictates otherwise. *Id.* at 521.

Because the Civil Service Reform Act contemplates that the head of an agency will make determinations regarding performance awards, one can reasonably construe the Board's general appropriations as available for payment of OIG SES performance awards in the same manner and to the same extent as non-OIG SES performance awards. Alternatively, one may reasonably construe the OIG appropriation as available for payment of OIG performance awards. In this regard, the payment of performance awards from the appropriation available for the activity which presumably benefitted from the performance being rewarded is not an unreasonable proposition. Also, the Board could view SES performance awards for OIG employees as akin to salaries and thus chargeable to the OIG appropriation.

We do not share the Board's concern that drawing on its general appropriations would constitute an impermissible augmentation of the OIG appropriation. As a general rule, an agency may not augment an appropriation from outside sources (including another of the agency's appropriations) without specific statutory authority. 59 Comp. Gen. 415, 417 (1980). This rule is derived from the principle that when the Congress appropriates funds for an activity, the appropriation represents a limitation on that activity, and all expenditures for the activity must come within that limitation. In this instance, an augmentation of the OIG appropriation would result only if it were clear that the Congress intended the OIG appropriation to be the exclusive source of funds for OIG performance awards. *See generally* 65 Comp. Gen. 635 (1986) (holding that because the Congress designated a Department of Labor appropriation as the exclusive source for paying administrative law judges hearing black lung cases, an augmentation would result if the Department borrowed judges from the National Labor Relations Board on a nonreimbursable basis).

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## Summary

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We do not agree with the Board's suggestion that the Civil Service Reform Act requires payment of OIG SES performance awards only from Board general appropriations. So long as the Board retains its statutory prerogative of determining OIG SES performances to be rewarded and amounts of awards, paying the awards from the OIG appropriation is not inconsistent with, nor would it de-

tract from, the Board's administrative responsibilities under the Act. In any event, we conclude that the Board's general appropriations, in the same manner and to the same extent as non-OIG SES performance awards, or the OIG appropriation can be reasonably construed to be available for OIG SES performance awards. The choice is the Board's, but once made, must be consistently followed.

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**B-227582, March 21, 1989**

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**Military Personnel**

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**Pay**

■ **Death gratuities**

■ ■ **Eligibility**

■ ■ ■ **Spouses**

In the absence of evidence that husband of deceased service member acted with felonious intent in connection with the member's death, he is entitled to death gratuity payable under 10 U.S.C. § 1477.

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**Matter of: Death Gratuity**

The parents of a deceased Navy member appeal a settlement of our Claims Group which denied their claim and which awarded the death gratuity authorized under 10 U.S.C. § 1477 to the deceased member's husband. The parents allege that the member's husband was responsible for her death. For the following reasons the settlement of the Claims Group is sustained and the deceased member's husband is entitled to the death gratuity and the claim of the parents must be denied.

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**Background**

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The deceased member of the Navy died of a gun shot wound on February 19, 1985. Her husband, also a member of the Navy, became a suspect in the investigation of her death. Investigations were conducted in this case by a civilian police department and by the Naval Investigative Service (NIS). Upon completion of the investigations, it was determined that evidence was insufficient to charge her husband with murder or any lesser offenses and that her death was a suicide.

The deceased member's parents claim, however, that the investigations were not conducted thoroughly and that their daughter's husband is guilty of premeditated murder of their daughter. The parents claim that they are the eligible beneficiaries of the death gratuity payment in view of their allegations and on the basis that the husband denied his marriage to their daughter when questioned by his commander.

Under the provisions of 10 U.S.C. § 1477(a) a death gratuity is payable upon the death of a member of the armed services. The death gratuity is payable to the member's spouse. If there is no spouse then the gratuity is payable to the mem-

ber's children. If there is neither a spouse nor children the gratuity may then be paid the member's parents if designated to receive the gratuity by the deceased member.

We have held that if felonious intent is attributable to an individual implicated in the death of a service member who would otherwise be entitled to the death gratuity, the gratuity may not be paid to that individual. *See* 55 Comp. Gen. 1033 (1976). However, in the absence of felonious intent on the part of the individual that person is entitled to the death gratuity.

In this case the matter was investigated by the proper authorities and a conclusion was reached that the deceased member's husband could not be charged with any offense in connection with her death. In these circumstances it appears that no felonious intent is attributable to the husband and he is therefore entitled to the death gratuity. Additionally, whether the husband denied his marriage to Navy officials has no bearing on the disposition of this case since he was the deceased member's lawful husband.

The burden of proof is on the claimant to prove the elements of his claim. Thus, a claim which is based on allegations not supported by the record may not be allowed.

Accordingly, the deceased member's parents are not entitled to the death gratuity and our Claims Group's settlement is sustained.

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**B-231406, March 22, 1989**

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**Civilian Personnel**

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**Travel**

■ **Overseas allowances**

■ ■ **Rental allowances**

■ ■ ■ **Eligibility**

Upon occupying rental quarters overseas, the employee claims he is entitled to the rental portion of the living quarters allowance authorized by 5 U.S.C. § 5923(2) (1982), despite the fact that he had previously owned and occupied a home at the same post for more than 10 years. We hold that the 10-year limitation on reimbursement of a rent substitute when the employee owns quarters did not bar his entitlement to rent reimbursement upon occupying rental quarters.

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**Matter of: Robert Kamiyama—Living Quarters Allowance—Rent Portion**

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The issue raised by the United States Marine Corps in forwarding this claim to us is whether an employee stationed in a foreign area is entitled to the rental portion of the living quarters allowance authorized under 5 U.S.C. § 5923(2) (1982) while occupying rented quarters when the employee had previously received the maximum 10-year rent substitute while occupying privately-owned

quarters at the same post.<sup>1</sup> We conclude, for the reasons stated below, that the employee is entitled to the rental portion of the allowance under these circumstances.

Mr. Kamiyama, a civilian employee of the United States Marine Corps, owned a home in Okinawa near his duty station where he resided between August 14, 1958, and June 24, 1978, when he sold the home and moved into government-furnished quarters. On June 10, 1983, he was required to vacate the government-furnished quarters and he rented a home, at which time the Marine Corps began paying him the full Living Quarters Allowance, including rent and utilities. However, the Marine Corps terminated the rental portion of the Living Quarters Allowance beginning March 27, 1985, and collected back the rental portion it had paid him since June 10, 1983. The Marine Corps and the Department of the Navy believe that, under section 136 of the Standardized Regulations,<sup>2</sup> Mr. Kamiyama's entitlement to the rental portion had expired, since as a home owner he had received in his Living Quarters Allowance a rent substitute for a 10-year period when he resided in the home. Section 136 provides in pertinent part:

When quarters occupied by an employee are owned by the employee or the spouse, or both, an amount up to 10 percent of original purchase price of such quarters shall be considered the annual rate of his/her estimated expenses for rent. . . . *The amount of the rental portion . . . is limited to a period not to exceed ten years. . . .* [Italic added.]

Further, section 136 provides that the period for the rent substitute is not extended beyond 10 years by the employee's:

- (1) sale or gift of quarters . . . with employee remaining in the same quarters, or
- (2) the purchase or exchange and move to other quarters in daily commuting distance of the same post.

The Living Quarters Allowance is authorized by 5 U.S.C. § 5923(2) (1982) and is intended to reimburse the overseas employee for the expense of residence quarters whenever government-owned or government-rented quarters are not provided without charge, and the reimbursement includes rent as well as utilities. For those employees who become eligible other than by transfer or a new appointment, the Living Quarters Allowance commences when the employee ceases to occupy quarters that are rent-free and begins paying quarters expenses. See sections 112 and 132.12 of the Standardized Regulations. See also Advisory Opinion to MSPB, B-220464, Jan. 15, 1986; *Urbina v. United States*, 428 F.2d 1280 (Ct. Cl. 1970).

We believe the Marine Corps misapplied section 136 in denying Mr. Kamiyama's claim. The 10-year limitation on payment of the rent substitute to a home owner applies only to quarters that are "occupied by an employee" and "owned by the employee or spouse or both." Mr. Kamiyama, after selling his home in 1978 and living in government-furnished quarters for 5 years, then leased rather than owned the new quarters for which he claims the rental portion of

<sup>1</sup> Request by A. A. Fontana, by direction, Commandant of the Marine Corps. (Reference 12592, MPC.33)

<sup>2</sup> Department of State Standardized Regulations, Government Civilians, Foreign Areas, Chapter 100.

the Living Quarters Allowance beginning on June 10, 1983, the date he first occupied the rented quarters.

The two additional provisos in section 136(1) and (2), quoted above, are obviously intended to prevent an employee from continuing to receive the rental portion beyond 10 years *when* (1) he or she remains in the same quarters as previously owned, or (2) buys (or acquires by exchange) other quarters at the same post.

Neither proviso is applicable to Mr. Kamiyama. The first does not apply because he did not remain in the same quarters. After he sold his house in 1978, he ceased to occupy it, and he moved into government-furnished quarters and then into leased quarters. Likewise, the second does not apply because Mr. Kamiyama did not acquire other quarters in the same area by purchase or exchange. Instead, after the sale of his previously owned quarters and after living in government-furnished quarters, he moved into leased quarters for which he began paying rent upon occupancy thereof in June 1983. Nothing in section 136 prohibits payment of the rental portion in these circumstances. Since he did not own the rented quarters and neither proviso (1) or (2) applies to the leased quarters, the 10-year limitation in section 136 does not bar the claim.

Accordingly, we hold that Mr. Kamiyama became entitled to resumption of the rental portion of the Living Quarters Allowance in June 1983.

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**B-226928, March 24, 1989**

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Necessary expenses rule**

■ ■ ■ **Awards/honoraria**

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**Military Personnel**

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**Pay**

■ **Awards/honoraria**

■ ■ **Eligibility**

Section 503 of title 14, United States Code does not provide authority similar to 5 U.S.C. § 4503 to pay monetary incentive awards for superior accomplishments to military members of the Coast Guard who were members of a group comprised of military members and civilian employees that was given a group award.

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**Matter of: Coast Guard—Cash Incentive Awards**

An authorized certifying officer of the United States Coast Guard, Department of Transportation, asks whether military members may participate in monetary group incentive awards made to a contracting team comprised of civilian em-

employees and military members of the Coast Guard.<sup>1</sup> It is our view that no authority exists for the payment of such an award.

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## Facts

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A determination was made that a contracting team comprised of civilian employees and military members of the Coast Guard was deserving of a group incentive award for superior performance. The Coast Guard regulation applicable to this subject at the time of the determination was Commandant Instruction 12450.2, dated February 13, 1979. Paragraph 1 of this Instruction states that its purpose is to provide guidance for granting monetary incentive awards to Coast Guard civilian employees. However, paragraph 10.d of this Instruction provides that in the case of group awards, all employees contributing to the accomplishment, including military members, may share in the award.<sup>2</sup>

The certifying officer indicates that he is aware that civilian employees of the government are eligible for such awards under chapter 45 of title 5, of the United States Code. However, military members are not included under this authority. He says that the only authorities to pay awards to members of the Coast Guard that he is aware of are 10 U.S.C. § 1124 and 14 U.S.C. § 503, and that neither section is applicable to overall superior performance or accomplishments. He also notes that monetary incentive awards for superior performance are not authorized for members of other armed services. Thus, he questions the propriety of certifying the payment of a monetary superior accomplishment award to the military members of this group.

Section 503 of title 14, United States Code, in part, provides:

The Coast Guard may award trophies, badges, and cash prizes to Coast Guard personnel or groups thereof, including personnel of the reserve components thereof whether or not on active duty, for excellence in accomplishments related to Coast Guard service, to incur expenses as may be necessary to enter such personnel in competitions . . . .

The forerunner of 14 U.S.C. § 503 initially was enacted as part of the Treasury Department's appropriation bill for 1930 and provided: ". . . cash prizes for men for excellence in gunnery, target practice, and engineering competitions . . . ."<sup>3</sup>

In testifying concerning this language Admiral Billard, Commandant of the Coast Guard, stated:

That is a little thing, Mr. Chairman, but a most desirable thing. That language, verbatim, has appeared in Navy appropriation bills for a good many years. What it means is this: In the interest of economy and efficiency, we have engineering competitions between vessels, and to the vessel that has the most economical operation in the engine room we write a letter commending the captain,

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<sup>1</sup> The decision was requested by J. R. Dopler, Authorized Certifying Officer, United States Coast Guard.

<sup>2</sup> Captain G. F. Woolever, U.S. Coast Guard, Acting Chief, Office of Personnel and Training, has since informed us that Coast Guard policy has been changed to prohibit payment of cash awards to military members for superior performance of duty. This change is clearly within the authority of the Coast Guard, but it has no effect upon the legality of the cash award in question here under the 1979 Instruction.

<sup>3</sup> Act of December 20, 1928, Ch. 39, 45 Stat. 1028, 1036 (1928).

the engineer, and so forth. Now, in the Navy certain men in a vessel's engine room get a little cash prize of \$10 or \$15, I believe, and it is all distinctly in the interest of efficiency and economy.<sup>4</sup>

The language of the statute and the testimony concerning it reflect an intent to provide cash prizes of nominal value to members who excel in the specified skills in the same manner as that provided for the Navy.

This language was continued in the various appropriation acts of the Treasury Department until 1949 when the Congress codified its provisions with the enactment of 14 U.S.C. § 503.<sup>5</sup> The codification did make some changes to the earlier statutes. It added authority to give trophies and badges as well as cash prizes for the competitions. Additionally, instead of stating "gunnery, target practice and engineering competitions" the phrase "for excellence in accomplishments related to Coast Guard service" was substituted.

As noted above the Coast Guard statute in this area is patterned on the Navy statute and in fact used similar language. The statute applicable to the Navy, section 8 of the act of August 2, 1946, Ch. 756, 60 Stat. 853, 854, provided in part:

The Secretary of the Navy is authorized to award medals, trophies, badges, and cash prizes to naval personnel or groups thereof (including personnel of the reserve components thereof whether or not on active duty), for excellence in accomplishments related to naval service, to incur such expenses as may be required to enter such personnel in competitions . . . .

In response to a question as to whether a Navy appropriation was available to meet expenses in awarding cash prizes for constructive suggestions and inventions, we had occasion to interpret language in the Navy statute and we concluded that the Act did not authorize awarding of such prizes, but was limited to awards for proficiency in arms and related skills. 27 Comp. Gen. 637 (1948). We see no basis for concluding that 14 U.S.C. § 503 was intended to have any broader meaning than the Navy statute.

Accordingly, it is our view that 14 U.S.C. § 503 does not and was not intended to authorize the payment of monetary awards for superior performance. The voucher should not be certified for payment and will be retained here.

<sup>4</sup> *Hearing on Treasury Department Appropriation Bill For 1930 Before the Subcommittee of House Committee on Appropriations*, 77th Cong., 2d Sess. 264 (1929) (Statement of Rear Admiral Frederick C. Billard, Commandant).

<sup>5</sup> Act of August 4, 1949, Ch. 393, 63 Stat. 495, 537 (1949).

**Procurement**

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**Competitive Negotiation**

■ **Contract awards**

■ ■ **Propriety**

■ ■ ■ **Corporate entities**

■ ■ ■ ■ **State/local personnel**

Protest that award to parent company is improper where the parent company submitted the initial proposal and its subsidiary submitted the revised technical proposal and best and final offer (BAFO) is denied where the agency reasonably regarded the two companies as a single entity and the individuals who signed the revised technical proposal and BAFO had the authority to represent and bind the parent company.

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**Matter of: Stacor Corporation**

Stacor Corporation protests the award of a contract to The Huey Company under request for proposals (RFP) No. DMA800-88-R-0022, issued by the Defense Mapping Agency (DMA) for light tables used in the preparation of maps and charts. The protester contends that award to The Huey Company was improper because Huey's initial proposal was submitted in the name of a company different from the one identified on the revised technical proposal and best and final offer (BAFO).

We deny the protest.

The RFP was issued as a total small business set-aside on May 31, 1988. The Huey Company submitted a timely proposal in its own name, signed by Len Zack, as the division president. The proposal identified Huey G. Shelton, Chief Executive Officer, and Raymond Biliskov, vice president, as individuals authorized to negotiate on Huey's behalf with DMA in connection with the RFP. Four other proposals were received. A technical evaluation team reviewed all five proposals and identified various deficiencies in them. The contracting officer notified the offerors in writing of the deficiencies and requested revised technical proposals. In response, Huey Manufacturing, Inc., submitted a revised one-page technical proposal for The Huey Company. The revised technical proposal was signed by Len Zack, as division president and submitted on stationery which read "Huey Manufacturing, Inc., a subsidiary of The Huey Company." The address and one of the phone numbers printed on the Huey Manufacturing, Inc., stationery are the same as the address and phone number of The Huey Company. Huey Manufacturing, Inc., also submitted a product catalogue along with the revised technical proposal. The name of The Huey Company appeared on the title page and throughout the catalogue; the name Huey Manufacturing, Inc., did not appear in the catalogue.

After the revised technical proposals were evaluated, the awardee and the protester were the only offerors determined to be in the competitive range. The contracting officer requested that The Huey Company and the protester submit BAFOs. Huey Manufacturing, Inc., submitted a BAFO for The Huey Company,

signed by Raymond Biliskov, as vice president and written on the same stationery as the revised technical proposal.

The solicitation stated that award would be made to the lowest priced technically acceptable offeror. Because Huey's proposal was determined technically acceptable and its price was lower than the protester's price, DMA awarded the contract to The Huey Company.

In essence, the protester argues that the award to The Huey Company is improper since the contracting officer had no basis to assume that Huey Manufacturing, Inc., a separate entity, had any authority to bind The Huey Company to the contractual obligations contained in the revised technical proposal and the BAFO. While we agree with the protester that The Huey Company and Huey Manufacturing, Inc., are two separate entities, we believe that under the circumstances here the contracting agency acted reasonably in awarding the contract to The Huey Company.

The awardee states that other than its incorporation in 1987, Huey Manufacturing, Inc., has never had a separate existence from The Huey Company. In this regard, the awardee explains that Huey Manufacturing, Inc., was incorporated when The Huey Company was contemplating a complete restructuring of the company whereby Huey Manufacturing, Inc., would become a wholly-owned and independently operating subsidiary. However, shortly after Huey Manufacturing's incorporation, these plans were abandoned and to this date Huey Manufacturing, Inc., is treated as a division of The Huey Company.

In our view, although legally two separate entities exist, the contracting agency reasonably assumed The Huey Company and Huey Manufacturing, Inc., were acting as a single entity for purposes of this procurement. The record shows that the two corporations share the same address, telephone number, division president, and vice president, and work is performed at the same location. Another indication that the two corporations were acting as a single entity is that the catalogue submitted by Huey Manufacturing, Inc., as part of the revised technical proposal contained only the name of The Huey Company and did not include any reference to Huey Manufacturing, Inc.

Further, the individuals who signed the revised technical proposal and the BAFO had the authority to bind The Huey Company to the obligations set forth in these submissions. The revised technical proposal was signed by Len Zack, who is the Division President of both companies. Because Mr. Zack signed the initial proposal submitted by The Huey Company, he had the authority to represent and bind The Huey Company during the course of this procurement. The BAFO was signed by Raymond Biliskov, who is the vice president of both companies and was identified in the initial proposal as an authorized negotiator with authority to represent and bind The Huey Company.

In view of the relationship between the two companies, and the fact that the individuals who signed the revised technical proposal and BAFO had the authority to represent and bind The Huey Company, we find that it was reasonable for the contracting officer to regard the two corporations as a single entity

for purposes of this procurement. As a result, we see no basis to object to the award to The Huey Company.

The protest is denied.

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**B-232742, March 28, 1989**

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**Civilian Personnel**

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**Travel**

- Permanent duty stations
- ■ Actual subsistence expenses
- ■ ■ Prohibition

Internal Revenue Service employees seek reimbursement of cost of attending a speech given by the Commissioner of the Internal Revenue Service at their permanent duty station, which included a meal. Cost of attendance may be paid under 5 U.S.C. § 4110 since attendance fee included the meal which was provided at no additional or separable cost and which was incidental part of the event in question.

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**Matter of: Internal Revenue Service—Meal Costs**

Ms. Georgia Fannin, an authorized certifying officer for the Internal Revenue Service, Central Region (IRS), has asked whether the employees of the Detroit Regional Office may be reimbursed for the cost of attendance at a speech given by the IRS Commissioner which included a meal. We conclude that reimbursement is proper.

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**Background**

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On April 11, 1988, the Commissioner of the IRS addressed the Economic Club of Detroit on the topic of the "Lessons Learned during the 1988 Filing Period by Taxpayers and the IRS." The Director of the IRS Detroit District expected his staff to attend the Commissioner's speech because it related to their administrative responsibilities. All of the attending staff members have as their official duty station the Detroit Headquarters Office.

The cost of attendance was \$18.50 per person, which included a luncheon before the speech. Tickets were issued and required for presence at the speech. Immediately following the luncheon, the Commissioner made his presentation. The entire presentation, including lunch, lasted 2-1/4 hours. For the reasons indicated below, we conclude that the cost of attendance may be reimbursed.

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**Analysis**

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We have long held that an employee may not be paid per diem or actual subsistence expenses while at his or her official duty station because those expenses are personal to the employee. 64 Comp. Gen. 406 (1985); B-224995, Dec. 11, 1987.

However, reimbursement is available if an employee pays a fee to attend a conference at his official or permanent duty station and a meal is provided at no additional cost and represents an incidental part of the meeting. 65 Comp. Gen. 508, 509 (1986); 38 Comp. Gen. 134 (1958). We have held that specific authority for such reimbursements may be found in 5 U.S.C. § 4110 (1982) which provides that:

Appropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.

The record in this case indicates that the IRS employees each had to pay a fee in order to attend the speech. The luncheon, which was incidental to the speech, was provided at no additional cost. According to the Executive Assistant to the District Director, "the value of the ticket was far greater than the value of the lunch received." Immediately after the luncheon, the Commissioner gave his speech which was the reason for the employees' attendance at the event.

We therefore conclude that the staff members may be reimbursed for the cost of attending the Commissioner's speech.

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**B-233996, March 29, 1989**

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**Procurement**

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**Sealed Bidding**

- **Invitations for bids**
- ■ **Amendments**
- ■ ■ **Acknowledgment**
- ■ ■ ■ **Responsiveness**

Contracting officer properly accepted bid that failed to acknowledge a solicitation amendment that required contractor to transport less than 200 pounds of government-furnished equipment 5 miles to the work site, since the work had no significant cost or other impact on performance, and thus was not material.

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**Matter of: DeRalco, Inc.**

DeRalco, Inc. protests the award of a contract to Hightower Construction Company, under invitation for bids (IFB) No. N62467-87-B-0237, issued by the Department of the Navy for the modernization of the truck and railroad loading facility at the Naval Supply Center in Charleston, South Carolina.

We deny the protest.

As issued, the solicitation required the contractor to install two Scully model ST-6-ELK, high level alarm control units (and corresponding Scully model SC-6AS connector kits), to be supplied to the contractor as government furnished equipment (GFE), for use in monitoring the automated loading of tank trucks with petroleum; in addition, the IFB generally required the contractor to fur-

nish all minor materials and work not specifically mentioned but nevertheless necessary for the proper completion of the project. Subsequently, the Navy amended the solicitation (amendment No. 0001) to add the following provision with respect to the GFE:

Government-furnished . . . materials and equipment are located within 5 miles of the job site. The Contractor shall load, transport, unload, uncrate, assemble, install, connect, and test all new and existing Government-furnished materials and equipment. New government-furnished equipment shall be uncrate by the Contractor in the presence of the Contracting Officer's Representative to determine any damage or missing parts. The Contractor shall notify the Contracting Officer in writing at least 14 days in advance of the date the Government-furnished material or equipment will be needed.

Although Hightower submitted the apparent low bid of \$612,000, it failed to acknowledge receipt of amendment No. 0001; Hightower subsequently explained that it had not been provided with the amendment when it picked up its bid package. The contracting officer determined that the failure to acknowledge the amendment properly could be waived as a minor informality pursuant to Federal Acquisition Regulation (FAR) § 14.405(d)(2), and made award to Hightower. Thereupon, DeRalco, the second low bidder, with a bid of \$619,142, filed this protest with our Office.

DeRalco argues that amendment No. 0001 was material, and that Hightower's bid therefore should have been rejected as nonresponsive, because the amendment imposed new, substantial obligations on the contractor. Specifically, the amendment required the contractor to load, transport, unload, uncrate, assemble, install, connect, and test pieces of costly, highly sophisticated electronic equipment; that it assume liability for the safe transport of the equipment to the project site; and that it assume the additional risk of providing a 14-day notice of its need for the GFE and then wait to uncrate the equipment until a representative of the contracting officer was present. DeRalco asserts that it was prejudiced competitively by Hightower's failure to acknowledge the amendment, because DeRalco increased its bid by \$10,000 to cover the extra work and risk created by the amendment and would have been the apparent low bidder had it not had to do so.

The Navy concedes that the amendment imposed a new obligation upon the contractor, *i.e.*, to transport the GFE for a distance of up to five miles. However, the agency maintains that the impact of the additional work was trivial at most. In this regard, the agency reports that the two control units are relatively small (15"x14"x8") and lightweight (55 pounds each), and that, likewise, the connectors consist of 20 feet of coiled cable that only weigh 13 pounds per kit. In addition, the agency points out that no special packaging was required, as the control units were already packed in explosion-proof enclosures and the cables were encased in plastic, and that no additional employees or special vehicles were necessary for transport.

Moreover, the Navy contends, since the solicitation as issued already required the contractor to maintain comprehensive general liability coverage (\$500,000), automobile liability coverage (\$200,000 per person and \$500,000 per occurrence),

workmen's compensation, and employer's liability coverage (\$100,000), and the value of the GFE itself was only \$5,558, the added responsibility of transporting the GFE for five miles would result in no significant change in the contractor's exposure to liability. Finally, the Navy asserts that the 14-day notice requirement and the requirement that a government representative be available at the uncrating should not have presented any cost burden from possible delays, since the solicitation allowed 240 days for contract performance.

A bidder's failure to acknowledge a material amendment to an IFB renders its bid nonresponsive since, absent such an acknowledgement, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. However, an amendment is material only if it would have more than a trivial impact on price, quantity, quality, or delivery of the item bid upon, or would have an impact on the relative standing of bidders. See Federal Acquisition Regulation § 14.405(d)(2); *Star Brite Construction Co.*, B-228522, Jan. 11, 1988, 88-1 CPD ¶ 17. A bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. See *Power Service, Inc.*, B-218248, Mar. 28, 1985, 85-1 CPD ¶ 374. No precise rule exists to determine whether a change required by an amendment is more than negligible; rather, that determination is based on the facts of each case. *Wirco, Inc.*, 65 Comp. Gen. 255 (1986), 86-1 CPD ¶ 103.

We do not find that the language added by the amendment imposed any significant legal obligations different from those imposed under the solicitation as issued; there is no evidence that the amendment would significantly increase the cost of performance. The contractor already was responsible for installing the alarm control units, including furnishing any minor materials and work necessary for installation; once the contractor installed and connected the equipment, the original solicitation required it to conduct a complete test of the automated petroleum dispensing system, of which the alarm control units were one component. Further, since the solicitation as issued did not make any specific provision for when and how the government would furnish the alarm control units, and in view of the 240-day period of performance, we think the requirement to give the Navy 14 days notice to furnish the GFE reasonably can be viewed as a clarification of how the contract would operate.

Similarly, the requirement to transport the alarm control units was an insignificant added task that we find should not have had any material effect on the cost of performance. The load was relatively small and lightweight, already packaged, and should not have required any special transport arrangements; moreover, as the GFE was located a maximum of five miles from the job site, no significant amount of time should have been required for transport. We also agree with the Navy that the contractor was subjected to no significantly increased liability from the transportation requirement. The contractor already was required to maintain extensive insurance coverage, and the equipment itself was worth only \$5,558. Indeed, DeRalco has alleged no increase in its cost of insurance as a result of the amendment.

Although DeRalco has provided our Office with a letter from a potential electrical subcontractor stating that the transportation requirement added by the amendment caused it to increase its quotation to DeRalco by \$10,000, we do not find this evidence persuasive. In our view, the subcontractor's statement is no more than a blanket statement by a party in interest that does not detail or explain how the amendment increased its performance cost; the subcontractor provided neither its worksheets nor any other evidence explaining how its quotation was affected by the amendment. Similarly, DeRalco has not furnished us a copy of the subcontractor's quotation, its own worksheets, or any evidence that DeRalco's bid reflects some increased cost due to amendment No. 0001.

We conclude that the amendment was not material, and that the Navy thus properly could waive Hightower's failure to acknowledge the amendment as a minor informality.

The protest is denied.

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## **B-234469.2, March 30, 1989**

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### **Procurement**

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#### **Bid Protests**

- GAO procedures
- ■ Information submission
- ■ ■ Timeliness

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### **Procurement**

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#### **Bid Protests**

- GAO procedures
- ■ Interested parties

Where protester is in possession of facts that would establish his interested party status under Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), but does not include those facts in its protest submission, protester bears the risk of dismissal for lack of interest and, upon reconsideration of the dismissal, General Accounting Office will not consider the information that could have been presented initially.

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### **Procurement**

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#### **Bid Protests**

- GAO procedures
- ■ Information submission
- ■ ■ Timeliness

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### **Procurement**

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#### **Bid Protests**

- GAO procedures
- ■ Interested parties

Where record does not indicate that stockholder in unsuccessful offeror firm is authorized to act on behalf of the firm, the stockholder is not an interested party to protest award to another firm under

Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), which define interested party as actual or prospective offeror; a corporation is a legal entity separate and distinct from its stockholders, and it is the corporation, not the stockholders, that is the prospective or actual offeror on the procurement.

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## **Matter of: Robert Wall Edge—Reconsideration**

Robert Wall Edge, as a major stockholder in Development Research Associates (DRA), requests reconsideration of our March 6, 1989 dismissal of a protest filed under the letterhead of Robert Wall Edge, Senior Human Resource Management (SHRM), against the Department of the Navy's December 21, 1988 award of a contract to Devon and Associates, under request for proposals No. N00600-88-R-3650.

We affirm the dismissal.

As our dismissal notice indicated, a party must be "interested" in order to have its protest considered by our Office. Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (Supp. IV 1986); Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988). CICA and our Regulations define an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(1); 4 C.F.R. § 21.0(a). We dismissed the initial protest, which alleged that the awardee had not independently arrived at its price, because neither Mr. Edge nor SHRM had submitted proposals; a firm which does not participate in a procurement, despite having an opportunity to do so, is not an interested party with standing to question the award. *See T-L-C Systems*, B-230086, Feb. 26, 1988, 88-1 CPD ¶ 204; *Syncor Industries Corp.*, B-224023.3, Oct. 15, 1987, 87-2 CPD ¶ 360.

In his request for reconsideration, Mr. Edge states that the dismissal was erroneous because he in fact filed the earlier protest in his role as the major shareholder in DRA, one of the offerors in the procurement. Mr. Edge argues that, contrary to our notice, he therefore possessed the necessary interest to protest the award to Devon.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of protest, 4 C.F.R. § 21.1(c)(4), and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(e). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *See Professional Medical Products, Inc.*, B-231743, July 1, 1988, 88-2 CPD ¶ 2. Since a protester can only have its protest considered, and thereby have an opportunity to prevail, if it is an interested party, the requirement for a detailed statement of the legal and factual grounds of protest necessarily encompasses information bearing on the protester's interested party status. *See id.*

Nothing on the face of the initial protest here indicated that it was being filed by a party with the requisite interest in the award; neither Mr. Edge nor SHRM submitted proposals, and the protest submission did not state that the protest

was being filed on behalf of DRA or any other firm. As the interest of the protester was not apparent on the face of the submission, and the submission's letterhead reference to SHRM actually clouded the issue, the dismissal was proper.

The new information now presented by Mr. Edge as establishing the requisite interest does not warrant reopening the protest. We have previously held with respect to the timeliness of a protest, another general prerequisite to consideration of a protest, that when a protest appears untimely on its face, a protester who is in possession of facts that would establish its timeliness, but who does not initially provide those facts to our Office, runs the risk of dismissal and of our refusal to reconsider the matter when the protester subsequently presents them. See *World-Wide Security Service, Inc.—Reconsideration*, B-225270.2, Mar. 17, 1987, 87-1 CPD ¶ 294; *Global Crane Institute—Request for Reconsideration*, B-218120.2, May 28, 1985, 85-1 CPD ¶ 606.

We believe the same rule should apply where, as here, a protester's interest in the matter is not apparent on the face of the protest, and the protester fails to provide information in its possession that establishes interested party status. Any other approach would permit a protester to present this material information in a piecemeal fashion and possibly disrupt the procurement process indefinitely. *Global Crane Institute—Request for Reconsideration*, B-218120.2, *supra*.

In any event, the information presented as establishing interested party status—the fact that Mr. Edge is the major stockholder in DRA—in fact does not establish that Mr. Edge was entitled to protest on behalf of DRA. It is a general principle that a corporation is a legal entity separate and distinct from its stockholders, and it generally is the corporation, not the stockholders, which is bound by a contract made by the corporation. See *generally Engineering and Professional Services*, B-219657, B-219657.2, Dec. 3, 1985, 85-2 CPD ¶ 621. Accordingly, it is the corporation itself, not the stockholders, that is the actual or prospective offeror in a procurement and is therefore entitled to file a protest concerning the procurement. See *generally Brooks Woolley, Inc.*, B-231970, Sept. 2, 1988, 88-2 CPD ¶ 211 (prospective supplier is not an interested party since it is not a prospective or actual offeror). There is nothing in the record indicating that Mr. Edge was authorized to protest on behalf of DRA.

The dismissal is affirmed.

**Procurement**

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**Payment/Discharge****■ Payment time periods****■ ■ Computation****■ ■ ■ Deadlines****■ ■ ■ ■ Fast payment procedures**

In response to a request from the Office of Management and Budget (OMB), GAO recommends that, if OMB includes a time computation rule in its pending revision to Circular A-125 which implements the Prompt Payment Act of 1982, as amended, it should follow modern, prevailing time computation practices, as exemplified by Rule 6(a) of the Federal Rules of Civil Procedure, and specify that prompt payment deadlines which expire on Saturdays, Sundays, or legal holidays should be extended until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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**Matter of: Office of Management & Budget**

This is in response to your February 15, 1989, request for a decision concerning a proposed revision to Circular A125, which implements the Prompt Payment Act of 1982, as amended (the PPA). The proposed revision would require agencies to make payments on Friday if the payment falls due on Saturday and permit payments on the next business day if a payment falls due on a Sunday or holiday. Given your agency's responsibility for establishing rules covering the PPA, we are responding with our comments and observations rather than a decision.

Our research on this issue indicates that the proposed revision does not reflect generally prevailing time computation practices. Since the PPA itself does not require the adoption of a different rule, we think it is preferable to conform prompt payment time computations to the prevailing practices of the public and private sectors. We believe that this approach would avoid unnecessary confusion and mistakes, and would assure greater equity between the government and its vendors. Accordingly, as explained in greater detail below, it is our view that if OMB chooses to address this issue in Circular A-125, it should state that whenever a prompt payment-related deadline falls on a Saturday, Sunday, or legal holiday, payment may be made without adverse legal consequence on the next day that is not a Saturday, Sunday, or legal holiday.

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**Background**

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The Prompt Payment Act of 1982, 31 U.S.C. §§ 3901-3906 (1982), as amended by the Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496, 102 Stat. 2455 (1988) (the PPA), generally provides that agencies which fail to pay for goods and services within 30 days after payment becomes due must pay an "interest penalty" to the contractors from whom those goods and services were acquired. 31 U.S.C. § 3902, *as amended*, § 2 and 3, 102 Stat. at 2455-57. The act also requires the payment of interest penalties whenever an agency takes a prompt payment discount after the discount period has expired. 31 U.S.C.

§ 3903, *as amended*, § 8, 102 Stat. at 2460. Neither the language nor the history of the PPA or its amendments address what impact, if any, results from the expiration of a prompt payment deadline on a Saturday, Sunday, or legal holiday.

OMB is authorized by the PPA to issue government-wide regulations to implement the act. 31 U.S.C. § 3903. Generally speaking, so long as those regulations have been properly promulgated and their contents are not arbitrary and capricious, they will be entitled to considerable deference, both administratively and before the courts. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977); 53 Comp. Gen. 364 (1973). At present, however, OMB's prompt payment regulations (found in Circular A-125, 52 Fed. Reg. 21926 (1987)) do not address the impact, if any, of prompt payment deadlines falling on a Saturday, Sunday, or legal holiday.

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## Discussion

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We have previously held that deadlines which expire on Sundays and legal holidays should be extended to the next day that is not a Sunday or legal holiday. 65 Comp. Gen. 53 (1985). While the decisions of the Comptroller General have not considered this question with respect to Saturdays,<sup>1</sup> we see no basis upon which to distinguish between Saturdays, Sundays, and legal holidays, given current government and business work practices. The common and critical factor for all three situations is that most state and federal government offices, as well as many private businesses, are not normally open on any of these three days. This was not always the case. Prior to the "advent of the five-day week,"<sup>2</sup> Saturdays were commonly regarded as "half holidays"—the first part of which was considered to be a normal workday. Deadlines which fell on Saturdays were given full effect. Sundays and holidays, on the other hand, were treated as non-work days. When a deadline fell on one of the latter two, it was extended to the next day that was not a Sunday or holiday.<sup>3</sup>

The modern practice may be seen in the rules governing time computations in the federal courts. As a general rule, when dealing with the problem of deadlines occurring on Saturdays, Sundays, and holidays, most federal courts<sup>4</sup> refer

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<sup>1</sup> The expiration of prompt payment discount deadlines on Saturdays was discussed in two unpublished, internal memorandums issued by GAO's General Counsel. In B-109319-O.M., July 16, 1952, our Claims Division was advised to disallow a claim against the United States for the refund of a prompt payment discount because payment had been made on the next working day (Monday) after the discount due date (Saturday). A subsequent memorandum opinion, B-118656-O.M., Nov. 23, 1966, questioned the legal basis for the decision in the prior case, and advised our auditors to delete from a draft management letter language criticizing administration officials for failing to take advantage of prompt payment discounts when payment was made on the Monday (i.e., the first working day) after the expiration on Saturday of prompt payment discount deadlines. For the reasons discussed in this letter, we do not view the 1966 opinion as reflecting the modern rule.

<sup>2</sup> *Cf. Wirtz v. Local Union 169, International Hod Carriers*, 246 F. Supp. 741, 750-51 (D. Nev. 1965).

<sup>3</sup> *See, e.g., 74 Am. Jur. 2d Time*, §§ 17-19.5 (1974 & 1987 Supp.).

<sup>4</sup> *E.g., Jones & Laughlin Steel Corp. v. Gridiron Steel Co.*, 382 U.S. 32 (1965). *See also Vappi & Co., Postal Service Board of Contract Appeals No. 924*, Dec. 30, 1980, *reprinted in* 81-1 B.C.A. ¶ 15,080 at 74,596 (CCH 1981); *Peninsula Marine, Army Corps of Engineers Board of Contract Appeals No. 3129*, Feb. 12, 1971, *reprinted in* 75-1 B.C.A. ¶ 11,130 at 52,942 (CCH 1975).

to the principles embodied in Rule 6(a) of the Federal Rules of Civil Procedure.<sup>5</sup> That rule provides:

In computing any period of time prescribed or allowed by these rules, . . . or by any applicable statute . . . [t]he last day of the period so computed shall be included, unless it is a *Saturday*, a *Sunday*, or a legal holiday, . . . in which event the period runs until the end of the next day which is not one of the aforementioned days. Fed. R. Civ. Proc. 6(a), 28 U.S.C.A. (1988 Supp.) (*Italic added*).<sup>6</sup>

As suggested by its reference to "any applicable statute," the rule seems to contemplate its application as a general rule of statutory construction.<sup>7</sup> Generally speaking, this rule allows *any* party, whether private or public, the benefit of some additional time in which to do an act (such as file a paper or make a payment) when the deadline involved expires on a Saturday, Sunday, or holiday. The major exception to this rule arises when the deadline at issue represents a "jurisdictional bar" to the bringing of a court action.<sup>8</sup> However, the deadline at issue here (*i.e.*, the last day on which payments may be made without incurring interest penalties under the PPA) clearly does not involve jurisdictional bars. Consequently, given the opportunity to rule on this issue, most federal courts would treat Saturdays, Sundays, and legal holidays alike, and authorize deferral of the deadline to the end of the next day that was not a Saturday, Sunday, or holiday.<sup>9</sup>

The boards of contract appeals have generally chosen to adopt the same rule.<sup>10</sup> This fact is particularly relevant since, under the PPA, disputed claims for in-

<sup>5</sup> The Federal Rules of Civil Procedure establish the procedures followed by United States district courts in all civil suits, whether cognizable as cases at law, in equity, or in admiralty, but do not govern the procedures followed in criminal cases, nor do they govern the procedures followed by other federal courts. *Cf.* Fed. R. Civ. Proc. 1, 28 U.S.C.A. (1988 Supp.).

However, most cases tried under federal law in federal courts are subject to the same basic principle, as codified in other applicable federal rules. *See, e.g.*, Fed. R. Crim. Proc. 45(a), 18 U.S.C.A. (1988 Supp.); Fed. R. App. Proc. 26(a), 28 U.S.C.A. (1988 Supp.); U.S. Ct. Ct. R. 6(a), 28 U.S.C.A. (1988 Supp.); U.S. Ct. Int. Trade R. 6(a), 28 U.S.C.A. (1988 Supp.); Fed. Bankr. R. 9006(a), 11 U.S.C.A. (1988 Supp.). *But, cf.* U.S. Sup. Ct. R. 29, 28 U.S.C.A. (1988 Supp.) (rule limited to Sundays and holidays; does not mention Saturdays).

Our review of the Code of Federal Regulations shows that many federal agencies have also adopted a similar rule for their administrative proceedings. Using the JURIS computerized legal research system, we were able to identify over 100 agency regulations which parallel Rule 6(a). *E.g.*, 5 C.F.R. § 831.107 (1988) (OPM); 17 C.F.R. § 12.5 (1988) (CFTC); 26 C.F.R. § 1.6655-7T(a)(1) (1988) (IRS); 49 C.F.R. § 821.1 (1987) (NTSB).

<sup>6</sup> Prior to 1963, this rule did not mention Saturdays. *See* Fed. R. Civ. Proc. 6(a), 28 U.S.C.A. (1988 Supp.) (note of Advisory Committee on Rules regarding the 1963 amendment).

<sup>7</sup> In *Union National Bank v. Lamb*, 337 U.S. 38 (1949), the Supreme Court applied an earlier version of Rule 6(a) to extend a statutory deadline for petitioning the Court for certiorari which fell on a Sunday. The Court explained that Rule 6(a) "provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by 'any applicable statute.'" *Id.* at 40-41. In reaching this conclusion, the Court found significant the facts that Rule 6(a) "had the concurrence of Congress, and . . . no contrary policy is expressed in the statute governing [the case then before the Court]." *Id.* (citations omitted). *See also* *Peninsula Marine, Army Corps of Engineers Board of Contract Appeals No. 3129*, Feb. 12, 1971, *reprinted* in 75-1 B.C.A. ¶ 11,130 at 52,942 (CCH 1975), *quoting* *Wirtz*, 246 F. Supp. at 750-51; *In Re Gotham Provision Co.*, 669 F.2d 1000, 1014 (5th Cir. 1982).

<sup>8</sup> *Cf., e.g.*, *Zipes v. TWA*, 455 U.S. 385, 392-98 (1982); *Hart v. United States*, 817 F.2d 78, 80 (9th Cir. 1987); *Milam v. United States*, 674 F.2d 860 (11th Cir. 1982); *But compare* *Martin v. First National Bank of Louisville*, (*In Re Butcher*), 829 F.2d 596 (6th Cir. 1987).

<sup>9</sup> For another indication of the modern trend in time computation practices, see section 8 of the Model Statutory Construction Act of 1975 (formerly the Uniform Statutory Construction Act of 1965), which suggests that time periods ending on Saturdays be treated the same as those ending on Sundays and holidays, and extended to the end of the next day that is not one of those three. 14 U.L.A. 520 (1980) and 14 U.L.A. 352 (1988 Supp.).

<sup>10</sup> *See, e.g.*, *Vappi & Co., Postal Service Board of Contract Appeals No. 924*, Dec. 30, 1980, *reprinted* in 81-1 B.C.A. ¶ 15,080 at 74,595 (CCH 1981); *Western Adhesives*, General Services Board of Contract Appeals No. 6868, Dec. 16, 1982, *reprinted* in 83-1 B.C.A. ¶ 16,182 (CCH 1983).

terest penalties are required to be submitted to the boards pursuant to the procedures established by the Contract Disputes Act, 41 U.S.C. ch. 9 (1982). 31 U.S.C. § 3906(a). Thus, if OMB's prompt payment regulations remained silent on this issue, it seems more likely than not that the boards would, when required to address this issue, eventually settle the question by extending to the next work day those PPA deadlines which expire on Saturdays, Sundays, and legal holidays.

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## Conclusions

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The modern, prevailing practice is to defer deadlines which expire on Saturdays, Sundays, and legal holidays to the next work day,<sup>11</sup> and the PPA does not require the adoption of a different rule. In our view, adoption of the prevailing rule would avoid the unnecessary mistakes and confusion that would inevitably arise if the government were required to compute time one way when it is the payee, and another way when it is the payor. Moreover, OMB's Circular A-125 only governs payments *by* the government. It cannot affect the time computation rules followed when private companies make payments *to* the government which are themselves subject to contractual, regulatory, or statutory due dates. (For example, delinquent debts owed to the United States must be paid within 30 days in order to avoid interest assessments under 31 U.S.C. § 3717 (1982).) Adoption of the prevailing rule for payments within the scope of the PPA would, we expect, result in equity between the government and its vendors by computing time similarly for both when payment falls due on one of these days.

For these reasons, if OMB decides to include a time computation rule in Circular A-125, we suggest that it provide that whenever a prompt payment-related deadline falls on a Saturday, Sunday, or legal holiday, payment may be made without adverse legal consequence on the next day that is not a Saturday, Sunday, or legal holiday.

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**B-233823, March 31, 1989**

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## Procurement

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### Competitive Negotiation

#### ■ Offers

#### ■ ■ Post-award error allegation

Where a mistake in an offer other than the awardee's offer is first alleged after award, the unsuccessful offeror must bear the consequences of its mistake where the contracting officer had neither actual nor constructive notice of an error before award to another offeror.

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<sup>11</sup> See *Armstrong v. Tisch*, 835 F.2d 1139, 1140 (5th Cir. 1988) ("This rubric [Rule 6(a)] has universal acceptance.").

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## Matter of: PAE GmbH Planning and Construction

PAE GmbH Planning and Construction protests the award of a contract to ITS International Services Co. under request for proposals (RFP) No. DAJA37-88-R-0263, issued by the Department of the Army for base maintenance services for Lindsey Air Station and Schierstein Compound in Wiesbaden, West Germany. PAE argues that contracting officials should have discovered a mistake in the firm's cost proposal, called it to PAE's attention, and resolved the error. PAE contends that if its proposal had been corrected for the obvious error, it would have been the low cost offeror and should have been awarded the contract.

We deny the protest.

The RFP contemplated the award of a cost-plus-award-fee contract for a base year period and 2 option years. Offerors were required to submit separate technical/management and cost proposals, and to submit offers in Deutsche Marks (DM). The RFP indicated that award would be made to the offeror whose proposal offered the best value to the government, with appropriate consideration given to the following evaluation areas listed in descending order of importance: (1) Technical, (2) Management and (3) Cost. The RFP further provided that, while cost was the least important evaluation area and would not be point-scored, it might become the determinative factor in the final source selection decision if proposals were judged to be substantially equivalent in the Technical and Management areas. Costs were to be evaluated on the basis of cost realism.

Four proposals were submitted by the October 10, 1988, closing date. Three, including those of PAE and ITS, were found substantially equal in technical merit and included in the competitive range. The Army conducted a cost realism analysis, determined that the three offerors' cost proposals were realistic, and awarded a contract on December 1, 1988, to the low offeror, ITS, without discussions. The Army notified PAE of the award by letter dated December 2, and PAE protested the award to our Office on December 9.

PAE maintains that there was a mistake in its cost proposal under the cost element entitled "Employee Liability Insurance." The rate used to determine the amount of this cost element, PAE argues, was cited in the "cost rationale" portion of its proposal as a rate<sup>1</sup> per \$100 of compensation. However, the amount of insurance in the six line items of its cost proposal dealing with employee liability insurance reflects a rate per \$1. PAE argues that if its mistake had been corrected, it would have been the low offeror and would have received the award. PAE further contends that the mistake was so obvious contracting officials should have noticed it and pointed it out so the firm could correct the mistake.

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<sup>1</sup> PAE requested that proprietary information in its proposal and protest not be disclosed outside the government. In order to comply with this request, we have reviewed PAE's proprietary cost information *in camera* and we will discuss PAE's costs only to the extent necessary to address the protest.

The Army responds that the protester did not notify the contracting officer of the insurance cost miscalculation prior to award, and the mistake was not so obvious that the contracting officer should have discovered it during an examination of the proposal. The Army notes that the protester's total proposed costs were in line with the amounts offered by others within the competitive range. According to the Army, the contracting officer did not consider verifying PAE's calculation of insurance costs because: (1) the insurance rate was not included on the individual worksheets attached to the cost proposal; (2) the protester consistently miscalculated the insurance costs so there was no internal discrepancy in the insurance amounts which would have alerted the contracting officer during her review; and (3) beyond the RFP provision requiring offerors to comply with local law pertaining to liability insurance, the amount of insurance was within each offeror's discretion. The Army notes that the amount of employee liability insurance proposed by the protester was comparable to that proposed by an offeror outside the competitive range.

Where, as in the instant case, a mistake in an offer other than the awardee's offer is first alleged after award, the general rule is that the unsuccessful offeror must bear the consequences of its mistake unless the contracting officer was on actual or constructive notice of an error before award. See *Autoclave Engineers, Inc.*, B-182895, May 29, 1975, 75-1 CPD ¶ 325; *BECO Corp.*, B-219651, Nov. 26, 1985, 85-2 CPD ¶ 601.

The record here does not show that the contracting officer had reason to suspect a mistake in PAE's offer. As noted by the Army, there was no internal discrepancy in insurance amounts proposed by PAE in the six lines of its cost proposal dealing with employee liability insurance. Nor did the Army's cost realism analysis reveal a substantial disparity between PAE's total proposed costs and those proposed by other offerors.

In conducting a cost realism analysis of competing proposals, an agency is not necessarily required to conduct an in-depth analysis or to verify each item, but rather to exercise informed judgments as to whether cost proposals are realistic in light of the contract requirements and proposed technical approaches. See *Ferguson-Williams, Inc., et al.*, B-232334, B-232334.2, Dec. 28, 1988, 88-2 CPD ¶ 630. The record shows that proposed rates for liability insurance varied considerably among the proposals, depending upon the amount of insurance selected, which the contracting officer felt reflected the business judgment of the offerors. While PAE comments that its proposed insurance costs were approximately 100 times those proposed by other offerors in the competitive range, the record shows the disparity was considerably less. Moreover, if PAE's insurance costs were corrected to the amounts PAE asserts it intended, the costs would be a fraction of those proposed by other offerors.

Accordingly, we find no basis for concluding that the contracting officer had actual or constructive notice of PAE's error before award; PAE's alleged mistake therefore is not correctable.

The protest is denied.

**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Responsiveness****■ ■ ■ Certification****■ ■ ■ ■ Omission**

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of a bid where such small business certification is not required for the type of contract to be awarded.

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**Matter of: Delta Marine, Inc.**

Delta Marine, Inc., protests the rejection of its low bid as nonresponsive and the award of a contract to Braswell Shipyards, Inc., under invitation for bids (IFB) No. DTCG80-89-B-00018, a total small business set-aside, issued by the Coast Guard for the drydocking and repair of the vessel, "Smilax." The agency rejected Delta Marine's bid because the firm failed to certify that all end items to be furnished under the contract would be manufactured or produced by small business concerns. We sustain the protest.

At bid opening on December 20, 1988, the agency received four bids; Delta Marine was the low bidder. Because Delta Marine failed to certify that all end items to be furnished under the contract would be manufactured or produced by a small business concern, the agency found its bid nonresponsive. The contract was awarded to the next low bidder, Braswell, on January 6, 1989. Delta filed this protest with our Office on January 17. Because the protest was not filed within 10 calendar days of the award, the Coast Guard was not required to, and did not, suspend performance under the contract. *See* 31 U.S.C. § 3553(d)(1) (Supp. IV 1986).

The IFB includes Federal Acquisition Regulation (FAR) clause 52.219-1, small business concern certifications. This clause contains the end item certification which is in dispute here. Delta Marine claims that neither it nor any other small business bidder can truthfully complete the certification because to its knowledge no small businesses manufacture some of the materials to be used in the repair of the vessel such as steel and brand name engine parts. In response, the agency states that the end item to which the certification pertains is the repaired vessel itself, not the individual parts used in performing the repairs. Whether the certification was intended to apply to the vessel itself or the individual parts used by the contractor is not the dispositive issue, however, since, as explained below, the certification is not required for the type of contract to be awarded under the IFB.

The IFB incorporates the standard Notice of Small Business Set-Aside clause, which states that the end item certification requirement does not apply to construction or service contracts. FAR § 52.219-6(c). Since the procurement here is for drydocking and repair services, and the award of a supply contract is not

contemplated, the end item certification does not apply. *Century Marine Corp.*, B-233574, Mar. 3, 1989, 68 Comp. Gen. 290, 89-1 CPD ¶ 235. Accordingly, Delta Marine's failure to complete the certification does not affect the responsiveness of its bid. *BCI Contractors, Inc.*, B-232453, Nov. 7, 1988, 88-2 CPD ¶ 451.

In view of our finding that the Coast Guard improperly rejected Delta Marine's bid as nonresponsive for failure to complete the end item certification, we sustain the protest. As noted above, because the protest was not filed within 10 days after award was made, the Coast Guard was not required to suspend performance under the contract. Since the Coast Guard has advised us that performance has been substantially completed, we do not recommend termination of Braswell's contract and award to Delta Marine. However, we find that Delta Marine is entitled to recover its bid preparation costs and the costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988). Delta Marine should submit its claim for such costs directly to the Coast Guard.

The protest is sustained.

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# Appropriations/Financial Management

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## **Appropriation Availability**

- **Purpose availability**
- ■ **Necessary expenses rule**
- ■ ■ **Awards/honoraria**

The Railroad Retirement Board may elect to use either its general appropriations or the separate appropriation supporting its Office of Inspector General (OIG) to pay performance awards to members of the OIG's Senior Executive Service. When one can reasonably construe two appropriations as available for an expenditure, we will accept an administrative determination as to which appropriation to charge; once the Board has made its selection, it must continue to use that appropriation.

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- **Purpose availability**
- ■ **Specific purpose restrictions**
- ■ ■ **Telephones**

The National Park Service may use appropriated funds to install private telephone service in residence of employee who was required to temporarily vacate his government-furnished residence for about 2-1/2 months during renovation. It is doubtful that Congress intended to preclude payment in such cases when enacting 31 U.S.C. § 1348(a)(1) (1982), which generally prohibits the payment of any expense in connection with telephone service installed in a private residence. *Airman First Class Vernell J. Townzel*, B-213660, May 3, 1984, overruled.

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# Civilian Personnel

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## Compensation

### ■ Additional compensation

#### ■ ■ Determination

#### ■ ■ ■ Apartment rental

A transferred federal employee rented a furnished condominium apartment at his new post of duty from another employee for use as temporary quarters while his new permanent residence was under construction. The lessor's rental of his property is unrelated to his official duties and does not result in additional pay or allowances under 5 U.S.C. § 5536. 7 Comp. Gen. 348 (1927) overruled.

329

### ■ Additional compensation

#### ■ ■ Medical officers

#### ■ ■ ■ Physicians

A medical officer of the Public Health Service is not eligible to enter into a service agreement for retention special pay when he is satisfying a pre-existing service obligation incurred as the result of financial assistance he received in medical school under the National Health Service Corps Scholarship Program.

329

### ■ Overpayments

#### ■ ■ Error detection

#### ■ ■ ■ Debt collection

#### ■ ■ ■ ■ Waiver

An employee asserted that because of changes in tax laws, his tax liability was increased due to his agency's error in overpaying him in 1986 for which he made refund in 1987, and that should be a basis for waiving the overpayment. The application of the tax laws to individual cases is a matter for the revenue authorities and is not a basis for waiving an erroneous payment of pay pursuant to 5 U.S.C. § 5584.

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### ■ Overpayments

#### ■ ■ Error detection

#### ■ ■ ■ Debt collection

#### ■ ■ ■ ■ Waiver

An employee was erroneously retained on the payroll by his agency for 2 days beyond his retirement resulting in an overpayment for final pay and leave. Waiver of the overpayment is denied, notwithstanding the employee's lack of fault, since the agency promptly notified the employee of the error and requested repayment. In these circumstances it is not against equity and good conscience, as provided by the waiver statute, to require repayment.

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**Civilian Personnel**

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■ **Personnel death**

■ ■ **Balances**

■ ■ ■ **Payees**

The claims by his mother and alleged son for unpaid compensation due a deceased civilian employee are too doubtful to be allowed without resolution by a court of competent jurisdiction. The alleged son's claim is higher on the statutory list of distribution; however, his status as son is based on a document executed by the deceased in El Salvador recognizing him as the deceased's son, and other information of record makes his status as biological son questionable.

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**Leaves Of Absences**

■ **Annual leave**

■ ■ **Charging**

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**Relocation**

■ **Household goods**

■ ■ **Shipment**

■ ■ ■ **Reimbursement**

■ ■ ■ ■ **Eligibility**

A transferred employee who was offered government housing for 1 year as an accommodation in a high-cost resort area may not be paid the expenses incurred in later moving his household goods locally to a private residence. Such moving expenses may be paid by the agency only where the employee is required to occupy government quarters. Furthermore, the employee may not have restored the 16 hours of annual leave used during the move.

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■ **Relocation service contracts**

■ ■ **Reimbursement**

■ ■ ■ **Direct costs**

The Bonneville Power Administration (BPA) is advised that BPA employees do not have to reimburse the agency for direct costs incurred incident to a relocation services contract when a residence sale is not completed. The authority to enter into relocation service contracts under 5 U.S.C. § 5724c (Supp. IV 1986) affords agencies a broader opportunity to provide services related to real estate transactions for transferred employees, subject to the terms of the agency's contract, and is not as restrictive as the language in 5 U.S.C. § 5724a(2)(4) (1982), which specifically refers to the sale and purchase of a residence.

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**■ Temporary quarters****■ ■ Actual subsistence expenses****■ ■ ■ Reimbursement****■ ■ ■ ■ Eligibility**

A transferred federal employee rented a furnished condominium apartment at his new post of duty from another employee for use as temporary quarters while his new permanent residence was under construction. Reimbursement is permissible for noncommercial lodgings if the charges are reasonable and result from expenses incurred by the other party. Hence, in this case the transferred employee may be allowed full reimbursement of the rent he paid based on information showing that the rent was less than the cost of commercial lodgings and was reasonably related to the actual expenses incurred by the other employee in the arrangement.

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**Travel****■ Overseas allowances****■ ■ Rental allowances****■ ■ ■ Eligibility**

Upon occupying rental quarters overseas, the employee claims he is entitled to the rental portion of the living quarters allowance authorized by 5 U.S.C. § 5923(2) (1982), despite the fact that he had previously owned and occupied a home at the same post for more than 10 years. We hold that the 10-year limitation on reimbursement of a rent substitute when the employee owns quarters did not bar his entitlement to rent reimbursement upon occupying rental quarters.

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**■ Permanent duty stations****■ ■ Actual subsistence expenses****■ ■ ■ Prohibition**

Internal Revenue Service employees seek reimbursement of cost of attending a speech given by the Commissioner of the Internal Revenue Service at their permanent duty station, which included a meal. Cost of attendance may be paid under 5 U.S.C. § 4110 since attendance fee included the meal which was provided at no additional or separable cost and which was incidental part of the event in question.

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**■ Rental vehicles****■ ■ Property damages****■ ■ ■ Claims****■ ■ ■ ■ Payments**

An Army employee who was authorized to rent a commercial vehicle while on temporary duty and who damaged the vehicle while returning it from the meeting place to his place of lodging at 2 a.m. was on official business and is entitled to be reimbursed for the payment of damages.

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# Military Personnel

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## Pay

### ■ Awards/honoraria

#### ■ ■ Eligibility

Section 503 of title 14, United States Code does not provide authority similar to 5 U.S.C. § 4503 to pay monetary incentive awards for superior accomplishments to military members of the Coast Guard who were members of a group comprised of military members and civilian employees that was given a group award.

343

### ■ Death gratuities

#### ■ ■ Eligibility

#### ■ ■ ■ Spouses

In the absence of evidence that husband of deceased service member acted with felonious intent in connection with the member's death, he is entitled to death gratuity payable under 10 U.S.C. § 1477.

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## Travel

### ■ Rental vehicles

#### ■ ■ Property damages

#### ■ ■ ■ Claims

#### ■ ■ ■ ■ Payments

Direct payment may be made to car rental company on behalf of military member who rented the car where the car was damaged by another member operating it recklessly, and for personal business, but the government also should collect any amounts it pays the company from the member who caused the damage.

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# Procurement

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## **Bid Protests**

### **■ Award pending appeals**

### **■ ■ Multiple/aggregate awards**

### **■ ■ ■ Propriety**

Contention that recommendation in decision sustaining protest which challenged several but not contract awards under solicitation providing for multiple awards was too narrow and should extend to all awards under the solicitation, whether or not the subject of a protest, is without merit when party challenging recommendation chose not to protest other awards and, as a result, those awards were not the subject of the decision sustaining the protest.

### **■ GAO procedures**

### **■ ■ Information submission**

### **■ ■ ■ Timeliness**

### **■ GAO procedures**

### **■ ■ Interested parties**

Where protester is in possession of facts that would establish his interested party status under Protest Regulations, 4 C.F.R. § 21.1(a) (1988), but does not include those facts in its protest submission, protester bears the risk of dismissal for lack of interest and, upon reconsideration of the protest, General Accounting Office will not consider the information that could have been presented initially.

### **■ GAO procedures**

### **■ ■ Information submission**

### **■ ■ ■ Timeliness**

### **■ GAO procedures**

### **■ ■ Interested parties**

Where record does not indicate that stockholder in unsuccessful offeror firm is authorized to act on behalf of the firm, the stockholder is not an interested party to protest award to another firm under Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), which define interested party as actual or prospective offeror; a corporation is a legal entity separate and distinct from its stockholders, and it is the corporation, not the stockholders, that is the prospective or actual offeror on the procurement.

### **■ GAO procedures**

### **■ ■ Protest timeliness**

### **■ ■ ■ 10-day rule**

### **■ ■ ■ ■ Forum election**

The fact that protest is first filed with General Services Administration Board of Contract Appeals and dismissed without prejudice for lack of jurisdiction does not preclude subsequent filing at General Accounting Office within 10 days of when protester originally learned its basis for protest.

**Competitive Negotiation**

**Competitive advantage**

**Conflicts of interest**

**■ Post-employment restrictions**

**■ ■ Allegation substantiation**

rules barring retired military officer from representing other parties before military department in 2 years of retirement and permanently barring officer from representing parties before government concerning matters in which officer was personally and substantially involved are, either explicit statutory language or agency regulation, not applicable to retired enlisted military personnel.

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**Contract awards**

**Award pending appeals**

**■ Multiple/aggregate awards**

**■ ■ Propriety**

where the solicitation contemplates multiple contracts for services required at many different locations throughout the country, and a protest has been filed against proposed awards at some but not all of those locations, the stay provision of the Competition in Contracting Act of 1984, 31 U.S.C. 53(c)(1) (Supp. IV 1986), requires the contracting agency to refrain from making awards only on the proposed contracts that are the subject of the protest.

314

**Contract awards**

**Initial-offer awards**

**■ Discussion**

**■ ■ Propriety**

contracting agency improperly made award on the basis of initial proposals, without discussions, where the record does not clearly show that the contract awarded will result in the lowest overall cost to the government.

334

**Contract awards**

**Propriety**

**■ Corporate entities**

**■ ■ State/local personnel**

test that award to parent company is improper where the parent company submitted the initial proposal and its subsidiary submitted the revised technical proposal and best and final offer (BAFO) and where the agency reasonably regarded the two companies as a single entity and the individuals who signed the revised technical proposal and BAFO had the authority to represent and bind the parent company.

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**■ Offers****■ ■ Evaluation****■ ■ ■ Descriptive literature**

Even though a request for proposals (RFP) did not specifically require the submission of descriptive literature with proposals, where protester submitted with its technical proposal its product brochure which indicated the item it offered did not comply with the RFP specifications without modifications, it was not improper for the contracting agency to reject the proposal as technically unacceptable based on that descriptive literature.

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**■ Offers****■ ■ Personnel experience****■ ■ ■ Contractor misrepresentation**

Protest is sustained in part where awardee failed to disclose material changes in the availability of its proposed key personnel which occurred between the submission of initial and best and final offers.

300

**■ Offers****■ ■ Post-award error allegation**

Where a mistake in an offer other than the awardee's offer is first alleged after award, the unsuccessful offeror must bear the consequences of its mistake where the contracting officer had neither actual nor constructive notice of an error before award to another offeror.

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**■ Offers****■ ■ Technical acceptability****■ ■ ■ Deficiency****■ ■ ■ ■ Blanket offers of compliance**

Where initial technical proposal makes a blanket offer to provide products that conform to the requirements of the request for proposals, but also takes specific exceptions to the solicitation specifications, the contracting agency's rejection of such proposal without discussions and award of the contract based on the lowest-priced, technically acceptable offer is not unreasonable or in violation of federal procurement principles if the solicitation explicitly provided that award might be made on the basis of initial proposals.

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- Unbalanced offers
- ■ Materiality
- ■ ■ Determination
- ■ ■ ■ Criteria

Awardee’s offer for base and option quantities is not materially unbalanced where the protester fails to show that the option quantities evaluated were not reasonably expected to be exercised and that award to the firm will not result in the lowest ultimate cost to the government.

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- Unbalanced offers
- ■ Rejection
- ■ ■ Propriety

The apparent low offer under a request for proposals for washer and dryer rental for a 1-year base period and two 1-year options is mathematically unbalanced where there is a price differential of 685 percent between the base year and the second option year and the requirement is essentially the same for all 3 years. Such an offer is properly rejected as materially unbalanced where the agency has a reasonable doubt that acceptance of the offer, which would not become low until the final option year, would ultimately result in the lowest overall cost to the government.

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- Contract Management
- Contract administration
- ■ Options
- ■ ■ Use
- ■ ■ ■ GAO review

Agency is not required to consult previous unsuccessful offeror during price analysis, nor is the agency required to issue a new solicitation to test the market before exercising an option merely because a previous offeror states that it would offer a lower price, when prices have already been tested in a fully competitive procurement in which the protester participated.

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- Contract administration
- ■ Options
- ■ ■ Use
- ■ ■ ■ GAO review

When agency’s exercise of an option is based on an informal price analysis that considered the prices offered under the original solicitation, market stability and other factors, protest that price analysis is insufficient is without legal merit.

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**Contract Types****■ Time/materials contracts****■ ■ Cost reimbursement**

Request for proposals (RFP), which estimates that 97 percent of work will be performed at the government site and 3 percent off-site, does not, contrary to protester's argument, permit an offeror to manipulate its level of effort so as to create an unrealistically low offer since the RFP requests only 1 hourly rate per labor category, which means that the successful offeror will be reimbursed at the same rate regardless of whether the work is performed at the government site or off-site.

311

**■ Time/materials contracts****■ ■ Cost reimbursement**

Under request for proposals for time and materials contract which specifically advises offerors not to propose any direct costs other than material and travel, and provides for payment for services based on fixed-labor rates, government is obligated to reimburse the successful offeror for expenses incurred in relocating its employees only to the extent that such costs are included in its labor rates.

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**Contractor Qualification****■ Responsibility criteria****■ ■ Distinctions****■ ■ ■ Performance specifications**

Protest that awardee's proposal did not meet solicitation requirement that contractor personnel possess top secret security clearance is denied since clearance is a contract performance requirement and the agency reasonably was satisfied that the awardee would meet the requirement.

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**Noncompetitive Negotiation****■ Use****■ ■ Justification****■ ■ ■ Urgent needs**

While an urgency determination was not required in order for the agency to exercise an option, the existence of a critical equipment need for outfitting ships in battlefield threat areas, in conjunction with the fact that the awardee is the only firm currently producing the item and the only firm which would not need to submit a first article prior to production provides a reasonable basis for an urgent sole-source award.

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**Payment/Discharge**

- **Payment time periods**
- ■ **Computation**
- ■ ■ **Deadlines**
- ■ ■ ■ **Fast payment procedures**

In response to a request from the Office of Management and Budget (OMB), GAO recommends that, if OMB includes a time computation rule in its pending revision to Circular A-125 which implements the Prompt Payment Act of 1982, as amended, it should follow modern, prevailing time computation practices, as exemplified by Rule 6(a) of the Federal Rules of Civil Procedure, and specify that prompt payment deadlines which expire on Saturdays, Sundays, or legal holidays should be extended until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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**Sealed Bidding**

- **Bids**
- ■ **Responsiveness**
- ■ ■ **Certification**
- ■ ■ ■ **Omission**

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of a bid where such small business certification is not required for the type of contract to be awarded.

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- **Bids**
- ■ **Responsiveness**
- ■ ■ **Small business set-asides**
- ■ ■ ■ **Compliance**

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of the bid where such small business certification is not required for the type of contract to be awarded.

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- **Invitations for bids**
- ■ **Amendments**
- ■ ■ **Acknowledgment**
- ■ ■ ■ **Responsiveness**

Contracting officer properly accepted bid that failed to acknowledge a solicitation amendment that required contractor to transport less than 200 pounds of government-furnished equipment 5 miles to the work site, since the work had no significant cost or other impact on performance, and thus was not material.

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**Socio-Economic Policies****■ Small businesses****■ ■ Competency certification****■ ■ ■ Applicability**

The Small Business Administration's Certificate of Competency program addresses a small business concern's responsibility for purposes of receiving a government contract and does not apply where the firm is not otherwise qualified to receive award.

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